No. 05-322

In The

Supreme Court of the United States

TIMOTHY K. HANNA,

Petitioner,

v.

MASSACHUSETTS TURNPIKE AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) What is the standard of review under the Public Use Clause of the Fifth Amendment in determining whether a sovereign improperly exercised its eminent domain power under the pretext of a facially valid public purpose?

2) Did the Massachusetts court apply the proper standard in reviewing the exercise of eminent domain power under the pretext of a facially valid public purpose in this case, where it focused its review on proof of the sovereign's "bad faith"?

PARTIES TO THE PROCEEDING

Petitioner, who was the plaintiff below, is Timothy K. Hanna owner of 1672 Worcester Road, Framingham, Massachusetts prior to the Massachusetts Turnpike Authority's eminent domain taking.

Respondent, who was the defendant below, is the Massachusetts Turnpike Authority ("the Authority"), which is a "body corporate and politic" created by M.G.L. c. 354 § 3 (1952) within the State Department of Public Works. It was created to construct, maintain, repair and operate a toll express highway known as the "Massachusetts Turnpike." M.G.L. c. 354 § 1 (1952). The Authority is a financially independent public entity that performs an essential government function but it is not subject to the supervision or regulation of any department of state government. Its internal management is composed of a Board of Directors whom the Governor appoints. M.G.L. c. 354 § 3 (1952). The Massachusetts Legislature has authorized the Authority to acquire either public or private property through the exercise of the eminent domain to carry out the construction, maintenance, repair and operation of the turnpike, which includes taking abutting property to preserve and protect the turnpike. M.G.L c. 354 § 5(k) (1952).

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PETITION FOR WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Petitioner Timothy K. Hanna respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment of the Commonwealth of Massachusetts Appeals Court.

CITATIONS TO THE OPINIONS BELOW

The decision of the Middlesex Superior Court for the Commonwealth of Massachusetts is reported at *Hanna v. Massachusetts Turnpike Authority*, 16 Mass. L. Rptr. 590 (Mass. Super. 2003) and reproduced at App. 4-13. The decision of the Massachusetts Appeals Court, of which review is sought, is an unpublished decision reproduced at App. 1-3. The denial of the Massachusetts Supreme Judicial Court for further appellate review is reported at *Hanna v. Massachusetts Turnpike Authority*, 444 Mass. 1104 (2005) and reproduced at App. 16.

STATEMENT OF JURISDICTION

On May 19, 2003, the Middlesex Superior Court for the Commonwealth of Massachusetts denied the petitioner's claim that the eminent domain taking violated the Fifth Amendment to the United States Constitution. (App. 4-12). The Massachusetts Appeals Court affirmed the Superior Court's judgment and adopted its reasoning in a memorandum and order pursuant to Rule 1:28 of the Massachusetts Appeals Court Rules on December 23, 2004. (App. 1-3). The Appeals Court denied the petitioner's

timely petition for reconsideration on April 25, 2005. (App. 14-15). The Massachusetts Supreme Judicial Court denied the petitioner's application to obtain further appellate review on June 9, 2005. (App. 16).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). (App. 18).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

This case implicates the Public Use Clause of the Fifth Amendment to the United States Constitution. (App. 17).

CONCISE STATEMENT OF THE CASE

On August 9, 1994, the respondent took 5.16 acres of the petitioner's private property in Framingham, Massachusetts, by eminent domain ("the locus"). The frontage of the locus runs parallel to Route 9 eastbound, while the rear of the locus abuts the exit loops of the Massachusetts Turnpike ("the Turnpike" also known as Interstate 90) at Turnpike Interchange 12. These loops encircle two islands of the respondent's real estate that totaled 56 acres (collectively "the Loop Ramp Parcels"). The rear of the locus also abuts the 9/90 Corporate Center, which is an office park that consists of roughly one million square feet of office space and includes Staples World Wide Headquarters. (*See* Maps at App. 54-55)

Throughout the process for the taking, the petitioner and several government officials understood that the locus

was a gateway to both the 9/90 Corporate Center and the Loop Ramp Parcels. Additionally during this period, the petitioner notified the respondent that he would lease the locus. The respondent, however, relying on a non-existent regulation determined that ownership in fee was mandated.

On December 6, 1991, the Massachusetts Department of Environmental Protection ("DEP") regulation 310 C.M.R. 7.37 mandated that the respondent: (1) establish roadway thresholds related to air quality standards within a defined study area; (2) study High Occupancy Vehicle ("HOV") lane and other defined HOV incentives; and (3) submit a report regarding the thresholds and its HOV study. (App. 30). DEP regulation 310 C.M.R. 7.37 defines the study area as "Interstate-90 [the Turnpike] eastbound and westbound between Interstate-93 and Interstate-95." (App. 30). But DEP regulation 310 C.M.R. 7.37 did not define Park & Ride lots as HOV incentives (App. 38); nor did it allow the respondent to substitute projects. (App. 37). Additionally, DEP regulation 310 C.M.R. 7.37 did not authorize the respondent to take private property by eminent domain.[1]

The respondent retained URS Consultants, Inc. ("URS"), a traffic consultant experienced in managing queue flows through turnpike toll plazas, to study a variety of HOV alternatives including: (1) HOV toll booths; (2) head to queue privileges; (3) electronic toll collection; and (4) HOV lanes. Additionally, at the direction of the respondent, URS conducted a separate Park & Ride study

[1] The respondent exercised its eminent domain power pursuant to M.G.L. c. 354 § 5(k) (1952).

managed by the respondent's real estate development department. (*See* App. 61-63).

By June 1994, URS published the final HOV study that also included the findings and conclusions of the separate Park & Ride study. The published study concluded that the Park & Ride program proposed by the respondent would have the same impact on air quality as the construction of an HOV lane and would cost less. (App. 56-60).

The respondent, as distinguished from URS, opined in the published HOV study that it would remove 1,170 vehicles from the Turnpike by providing express bus service and Park & Ride lots to Turnpike commuters because the users would park in the lots and commute to Boston in another transportation mode.[2] (App. 59). In support of this opinion, the respondent proposed to acquire and construct Park & Ride lots in proximity to various interchanges along the Turnpike. It planned to locate the largest lots in Framingham, Natick, and Weston, Massachusetts.[3]

The respondent and URS were aware of an ongoing commuter rail development from Worcester, Massachusetts,

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[2] Park & Ride transportation modal usage identifies commuters who after parking their vehicle would continue their commute to their final destination through either bus usage, van pooling, or car pooling.

[3] The respondent's studies forecasted that the Framingham, Natick, and Weston locations would remove 950 vehicles destined for Boston from the Turnpike, 85% of the projected total of 1,170 vehicles. Framingham, Massachusetts is located 22.6 miles west of Boston; Natick, Massachusetts is located 17.8 miles west of Boston; and Weston, Massachusetts is located 10.7 miles west of Boston. Framingham and Natick are outside the study area for DEP Regulation 310 C.M.R. 7.37.

to Boston, Massachusetts, that ran parallel to the Turnpike corridor before it published the final HOV study. The respondent was also aware that the commuter rail would have a positive affect on air quality standards because it projected 2,550 riders and the removal of vehicles destined for Boston from the Turnpike. Additionally, it totally eliminated any demand for bus service in the Turnpike corridor. Furthermore, the respondent and URS were aware its technical studies clearly demonstrated that the actual Park & Ride modal usage was substantially lower than the modal usage it utilized in support of its projections.[4] Despite the findings of its own technical studies and the ongoing commuter rail development, the respondent bootstrapped its projections for Park & Ride demand by implying that it would provide newly scheduled express bus service in the Turnpike corridor.

The respondent chose the locus for a Park & Ride facility based on its claim that a parking lot located there would remove 250 vehicles from the Turnpike. (*See* App. 61-62). It chose this location without a public hearing[5] or a vote of its Board of Directors and despite URS's suggestion of another location in Framingham.

Under its taking order, the respondent stated that it took the locus to develop a commuter parking lot for the safe and efficient operation of the turnpike for compliance with the provisions of the Clean Air Act and DEP regulation 310 C.M.R. 7.37. (*See* App. 47). The respondent has

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[4] For example, respondent projected 70% of Park & Ride users would take a bus to Boston while the findings of its Park & Ride survey indicated that only 24.8% of users had an interest in taking a bus.

[5] The trial court found that the respondent did not have a practice of conducting public hearings prior to eminent domain takings. (App. 7)

never produced the provisions of the Clean Air Act that the taking order references at any point during this litigation.[6] Additionally, DEP regulation 310 C.M.R. 7.37 did not instruct the respondent to acquire or construct parking lots, but merely to conduct a study and to submit a report. It did not recognize that Park & Ride lots were HOV incentives, nor did it authorize the respondent to substitute projects.

The respondent did open a Park & Ride lot on the locus after the taking. An average of 14 cars a day have utilized this lot throughout the litigation, but only one user was a newly created Park & Ride driver. The respondent, however, made no effort to provide the express bus service required for the Park & Ride program to succeed. (*See* App. 64-67). Additionally, the respondent failed to construct the program's proposed Park & Ride lots in Natick and Weston.

In 1997, Boston Properties, Inc. initiated an agreement with the respondent to develop the Loop Ramp Parcels into a hotel office park and to utilize the locus as the gateway. (*See* App. 61-62). In 1998, the respondent entered into that agreement.

On August 1, 1997, the petitioner filed an action in Middlesex Superior Court. The petitioner specifically alleged a violation of the Fifth Amendment to the United States Constitution in the first count. (App. 42). The respondent moved to dismiss the case because the complaint failed to state a claim upon which relief could be granted and the trial court granted the respondent's

[6] No representative for the respondent could identify the Clean Air Act referenced in the order of taking.

motion. On May 12, 1998, the petitioner appealed and the Massachusetts Appeals Court granted the appeal by reinstating the counts that alleged the taking violated the Fifth Amendment and was in bad faith.[7]

Subsequently, in the trial court, the respondent moved for summary judgment at the conclusion of discovery. On May 16, 2003, the Middlesex Superior Court granted the respondent's motion because the petitioner could not "prove that the sole or dominant purpose was anything other than the stated purpose." (*See* App. 5). The court stated it found no evidence in the record that would support a claim that the taking was for an improper purpose. (*See* App. 6-8). In reaching its conclusion, the court gave complete deference to the respondent's decision to take the locus. (*See* App. 5-8). Additionally, the court failed to consider the petitioner's evidence that demonstrated the respondent's public purpose did not have a rational basis. Furthermore, the petitioner's evidence that attacked the credibility of the respondent's stated public purpose did not persuade the court that the facially valid public purpose was a pretext for an improper purpose.[8] (*See* App. 6).

The petitioner appealed on June 19, 2003, and the Massachusetts Appeals Court affirmed the lower court's decision on December 23, 2004. (*See* App. 2-3). The petitioner

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[7] *See HTA Limited Partnership v. Massachusetts Turnpike Authority*, 51 Mass. App. Ct. 449 (2001).

[8] The petitioner presented evidence that the Park & Ride lot was severely underutilized and that the expert's opinion for the petitioner contradicted the methodology and conclusions of the respondent's studies, in addition to the evidence that the respondent failed to comply with its own requirements for the parking lot success.

then filed a Petition for Reconsideration to the Appeals Court on January 19, 2005, which the court denied on April 25, 2005. (App. 14-15). Finally, the petitioner filed for further appellate review, restating his rights under the Fifth Amendment, on January 20, 2005. (*See* App. 46). The Massachusetts Supreme Judicial Court denied the petitioner's application on June 9, 2005. (App. 16).

REASONS FOR GRANTING THE PETITION

I. This case presents an issue of significant importance because the lower courts have applied different standards in reviewing eminent domain takings for a facially valid public purpose under the Public Use Clause of the Fifth Amendment.

The individual's right to hold private property is sacred and is necessary for a free government.[9] But the power to take private property through eminent domain is "essential to a sovereign government."[10] When a sovereign takes an individual's private property through its exercise of eminent domain, these two fundamental principles clash and only one can prevail. Our founding fathers recognized this tension and drafted the Fifth Amendment to the Constitution to protect the individual's property rights and to limit the sovereign's power.[11]

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[9] *Wilkinson v. Leland*, 27 U.S. 627, 634 (1829).

[10] *United States v. Carmack*, 329 U.S. 230, 236 (1946).

[11] *See Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1871) (Court has always understood that the Fifth Amendment was adopted to protect the rights of the individuals from governmental intrusion).

This Court has developed its interpretation of the Public Use Clause of the Fifth Amendment to limit the sovereign's eminent domain power by restricting constitutional takings to those with a proper public purpose.[12] The Court has also recognized that an eminent domain taking will not pass constitutional muster if it is either for a purely private purpose or under a pretextual public purpose.[13] The Court, however, has yet to state clearly a standard of review to determine whether the facially valid public purpose posited for a taking is a pretext for an improper purpose.[14] This case now presents the Court with the opportunity to establish that standard of review.

The state courts and the lower federal courts are in need of guidance from this Court to determine what constitutes a pretextual public purpose under the Public Use Clause because neither has developed a clear standard of review. A few lower federal courts have suggested that the Public Use Clause will not support an eminent domain taking under the pretext of a facially valid public

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[12] *See Kelo v. City of New London*, 125 S.Ct. 2655, 2671 (2005) (O'Connor, J., dissenting) and 2678 (Thomas, J., dissenting).

[13] *See id.*, at 2661; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Cincinnati v. Vester*, 281 U.S. 439, 448 (1930) (a sovereign may not take private property "under the guise" of a proper purpose).

[14] *Kelo*, 125 S.Ct. at 2675 (O'Connor, J., dissenting) (criticizing the majority for failing to describe a standard of review for a court to determine if a public purpose is a pretext for a private purpose). The Court, however, has suggested that the procedures followed by the sovereign could be a factor in determining whether a facially valid public purpose was a pretext for an improper purpose. *See id.*, at 2661-2662 (dismissing the possibility that the public purpose for the taking was pretextual because the City of New London executed the taking pursuant to a "carefully considered development plan").

purpose.[15] One court has even invalidated an eminent domain taking on those grounds.[16] But none of these courts has elucidated how it determined whether the facially valid public purpose was a pretext for an improper purpose.

Additionally, the state courts have not developed a singular standard of review for pretextual public purpose claims. State courts have utilized several different standards of review: (1) some have equated it to the standard of review for bad faith or fraud;[17] (2) one has alluded to a methodology that requires an individual to demonstrate that the sovereign's facially valid public purpose is invalid rather than proving an ulterior motive;[18] and (3) one federal court has interpreted its state's law as applying a

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[15] *See Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (stating that the Fifth Amendment would lose its ability to limit the eminent domain power if the sovereign could take private property "merely by positing a conceivable public purpose to which the taking is rationally related") (internal quotations omitted); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123, 1129 (C.D. Cal. 2001).

[16] *99 Cents Only Stores*, 237 F.Supp.2d at 1129-1131 (holding that eminent domain taking was clearly based on a pretextual public purpose).

[17] *See City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 14-15 (Nev. 2003) (examining the fraud, bad faith, and pretextual public purpose claims together); *State ex. rel. Washington State Convention Center v. Evans*, 136 Wash.2d 811, 823 (1998) ("fraud or constructive fraud would occur if the public use was merely a pretext to effectuate a private use on the condemned lands"); *Pheasant Ridge Associates Limited Partnership v. Town of Burlington*, 399 Mass. 771, 775 (1987) ("a municipal land taking, valid on its face, may be invalid because it was undertaken in bad faith).

[18] *See Hurwitz v. City of Orange*, 122 Cal.App.4th 835, 852-854 (2004) (finding city's nuisance order clearly pretextual because only ordered to provide proper purpose for eminent domain taking).

reasonableness standard.[19] Some state courts have not developed any basis for a standard of review and have merely suggested that a sovereign's eminent domain taking under the pretext of a facially valid public purpose is not a proper taking.[20]

Some courts say that an individual can demonstrate a pretextual public purpose only through proof of bad faith; others suggest that the individual does not need to demonstrate bad faith.[21] The lower federal courts and some state courts recognize that an eminent domain taking under the pretext of a facially valid public purpose is invalid without addressing any standard of review.[22] Because there is no clear standard of review for a pretextual public purpose claim, there is a risk that: (1) pretextual public purpose claims under similar facts arising in different forums will be decided differently; (2) some courts will allow a sovereign to take an individual's private property after merely examining the facial validity of the public purpose; and (3) worse, the sovereign, acting as a real estate speculator,

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[19] *See Milligan v. City of Red Oak, Iowa*, 230 F.3d 355, 360 (8th Cir. 2000) (interpreting Iowa state law as examining a pretextual public purpose claim under its objective standard for examining whether the purpose is public).

[20] *See, e.g., McIntosh v. Dill*, 205 P. 917, 921 (Okla. 1922); *Village of Hamtrack v. Simons*, 201 Mich. 458, 465 (1918); *Brevoort v. Grace*, 53 N.Y. 245, 256 (1873) ("if [the legislature] should vacate a grant of property under the pretext of some public use . . . the law would be unconstitutional and void").

[21] *E.g., Hurwitz*, 122 Cal.App.4th at 852-854; *Pappas*, 76 P.3d at 14-15; *Evans*, 136 Wash.2d at 823; *Pheasant Ridge*, 399 Mass. at 775.

[22] *E.g., Armendariz*, 75 F.3d at 1321; *99 Cents Only Stores*, 237 F.Supp.2d at 1129-1131; *Milligan*, 230 F.3d at 360; *McIntosh*, 205 P. at 921; *Village of Hamtrack*, 201 Mich. at 465; *Brevoort*, 53 N.Y. at 255-256.

may take an individual's private property under the façade of a facially valid public purpose.

Since its early interpretations of the Public Use Clause, this Court has expressed a concern that a sovereign could erode an individual's private property rights under the pretext of a facially valid public purpose.[23] The Court, however, has not yet followed that concern with a clear standard of review to protect the individual's rights. This case presents the unique opportunity to guide the lower courts by clearly establishing the appropriate standard of review for a pretextual public purpose claim.

II. The Massachusetts courts' standard of review for pretextual public purpose claims is less protective of an individual's property rights than the standard of review that this Court would apply under the Fifth Amendment to the Constitution.

When the United States Constitution defines the minimum level of protection afforded to an individual, the states cannot reduce that level of protection.[24] The Fifth

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[23] *See Pumpelly*, 80 U.S. at 178 (an interpretation of the Public Use Clause that would allow a sovereign to invade a "private right under the pretext of the public good" is repugnant to the "laws of our ancestors").

[24] *See* U.S. Const. Art. VI ("the Constitution and the laws of the United States . . . shall be the law of the land; and the judges in every state shall be bound thereby"); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985) (the sovereign authority of the States is limited by the Constitution itself); *Mayo v. United States*, 319 U.S. 441, 445 (1943) ("it is necessary for uniformity that the laws of the United States be dominant over those of any state"); *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819) ("the laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the

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Amendment provides the minimum level of protection for an individual's property rights by requiring that the sovereign exercise its eminent domain power pursuant to a proper public purpose.[25] When determining a proper public purpose, this Court has applied a rational basis standard of review to uphold the protection of the Fifth Amendment.[26]

Additionally, this Court has established that the role of the judiciary in examining the validity of a sovereign's eminent domain taking is limited to its review of the public purpose.[27] The judiciary's role is so limited because it is deferential to the sovereign's judgment.[28] But this Court has indicated that the review of pretextual public purpose claims properly belongs within the judiciary's authority.[29]

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land, anything in the laws of any state to the contrary, notwithstanding").

[25] *See* U.S. Const. Amend. V. *See also Kelo*, 125 S.Ct. at 2661 (this Court has applied the Public Use Clause of the Fifth Amendment to the States by requiring a public purpose for the taking) citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-164 (1896); *see also Midkiff*, 467 U.S. at 241 (this Court has "repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose' ") quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937).

[26] *See Midkiff*, 467 U.S. at 241(an eminent domain taking must be "rationally related to a conceivable public purpose").

[27] *See id.*, at 239-240; *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

[28] *Midkiff*, 467 U.S. at 241 ("the Court has made clear that it will not substitute its judgment for the legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation") quoting *United States v. Gettysburg Electric Co.*, 160 U.S. 668, 680 (1896) (internal quotations omitted).

[29] *See Kelo*, 125 S.Ct. at 2661-2664 (discussing inability of sovereign to take private property under a pretextual public purpose within

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Massachusetts courts also limit the judiciary's role in examining an eminent domain taking.[30] Whereas this Court limits the judiciary's review to a proper public purpose, Massachusetts courts examine a taking for bad faith in addition to their review of a proper public purpose.[31] Massachusetts courts, however, examine pretextual public purpose claims solely for bad faith.[32] By limiting their examination of pretextual public purpose claims to bad faith, Massachusetts courts have become more restrictive than this Court.

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the discussion of its review of the City of New London's public purpose); *Vester*, 281 U.S. at 446-447 (rejecting sovereign's taking under its public purpose review because the mere recital of a public purpose was not rationally related to the taking).

[30] *See Luke v. Massachusetts Turnpike Authority*, 337 Mass. 304, 308 (1958) (public purpose review is within the judiciary's role in examining an eminent domain taking while the examination of necessity is outside that role); *McAuliffe & Burke Co. v. Boston Housing Authority*, 334 Mass. 28, 30 (1956); *City of Boston v. Talbot*, 206 Mass. 82, 89-90 (1910).

[31] *See Chelmsford v. DiBiase*, 370 Mass. 90, 92-93 (1976) (court must protect an individual's property rights from an eminent domain taking when the taking is for an illegitimate public purpose or not in good faith and not for a public benefit); *Poremba v. City of Springfield*, 354 Mass. 432, 434 (1968) (a condemnee must allege underlying facts that the taking was not for a public purpose or that the sovereign's actions were not in good faith and not for a public benefit).

[32] *Contrast Pheasant Ridge*, 399 Mass. at 776 (bad faith "includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking may be valid ones") *with Kelo*, 125 S.Ct. at 2661-2664 (discussing inability of sovereign to take private property under a pretextual public purpose within the discussion of its review of the City of New London's public purpose); *and Vester*, 281 U.S. at 446-447 (rejecting sovereign's taking under its public purpose review because the mere recital of a public purpose was not rationally related to the taking).

Under Massachusetts law, the condemnee must demonstrate that the sovereign intended an improper purpose as the sole or dominant reason for the taking to establish that the sovereign acted in bad faith.[33] When examining intent, the courts will consider what the sovereign said and will draw inferences from what it said or did not say.[34] The courts have also suggested other factors to determine intent, such as: (1) facts indicating that the taking authority did not follow its "usual practices" in conducting the taking; (2) facts indicating that the site chosen had not previously been considered; or (3) facts indicating that the taking authority had previously considered the site unsuitable for the stated public purpose of the taking.[35] This has essentially required the condemnee to establish that the sovereign has engaged in a fraud to succeed in a pretextual public purpose claim.[36] In the absence of a smoking gun that demonstrates bad faith or

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[33] *See Benevolent & Protective Order of Elks Lodge No. 65 v. Planning Board of Lawrence*, 403 Mass. 531, 551 (1988) (sovereign has not acted in bad faith if the predominant motive for the taking was a proper public purpose); *Pheasant Ridge*, 399 Mass. at 776 ("[bad faith] includes the use of the power of eminent domain solely for a reason that is not proper"); *HTA Limited Partnership v. Massachusetts Turnpike Authority*, 51 Mass. App. Ct. 449, 455 (2001).

[34] *Pheasant Ridge*, 399 Mass. at 377.

[35] *HTA Limited Partnership*, 51 Mass. App. Ct. at 456 citing *Benevolent & Protective Order of Elks Lodge No. 65*, 403 Mass. at 552-553 and *Pheasant Ridge*, 399 Mass. at 778.

[36] *Cf. Sahin v. Sahin*, 435 Mass. 396, 402 n. 9 (2001) (common-law fraud requires the plaintiff to establish that the defendant "made false representations" with "knowledge of the falsity") quoting *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703 (1975).

fraud, the condemnee cannot overcome the sovereign's declaration of a facially valid public purpose.[37]

Here, the petitioner demonstrated that the facially valid public purpose lacked a rational foundation: (1) the survey data compiled by the respondent's own consultant demonstrated that there was no demand for Park & Ride lots within the Turnpike corridor, specifically in the area of the petitioner's private property; (2) the respondent knew its proposed Park & Ride program had absolutely no chance of success unless it provided express bus service; (3) the respondent did not provide the express bus service that it required for the program's success; (4) the actual use of the Park & Ride lot was substantially less than the forecasted use; (5) the respondent did not construct the other proposed lots at Natick and Weston; (6) the respondent's taking order falsely declared that the taking was in compliance with the Clean Air Act and with DEP regulation 310 C.M.R. 7.37; (7) DEP regulation 310 C.M.R. 7.37 only required the respondent to submit a study of HOV alternatives and did not include Park & Ride lots as an HOV facility; (8) there were no public hearings on the propriety of this taking, and the respondent's Board of Directors never conducted a vote to adopt the Park & Ride program, which was a policy level decision requiring such a vote; and (9) that the locus is currently intended to be used as a gateway to commercially develop the respondent's loop-ramp parcels. The Massachusetts court totally disregarded this evidence. The court instead focused on the fact that the petitioner had no prospect of proving that the sole or dominant purpose for the

[37] The Massachusetts courts have recognized that bad faith imposes an extremely high burden upon the condemnee. *Pheasant Ridge*, 399 Mass. at 776.

taking was anything other than its stated public purpose of a Park & Ride facility.[38]

The Massachusetts courts' review of pretextual public purpose claims is far more deferential to the sovereign's judgment than the review that this Court would apply under the Public Use Clause. The Massachusetts courts require the condemnee to demonstrate that the sovereign was motivated by bad faith or an improper intent on the day of the taking.[39] This Court, however, would require only that the condemnee demonstrate that the taking was not "rationally related to a conceivable public purpose."[40] This Court has never imposed the additional burden of a demonstration of bad faith or an improper intent in its review of public purpose under the Public Use Clause.[41]

The Massachusetts requirement that the condemnee demonstrate bad faith is distinct from the burden of demonstrating an invalid public purpose.[42] Massachusetts has created a more limited review of pretextual public

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[38] *See Hanna v. Massachusetts Turnpike Authority*, 16 Mass. L. Rptr. 590 (2004).

[39] *See Benevolent & Protective Order of Elks Lodge No. 65*, 403 Mass. at 551; *Pheasant Ridge*, 399 Mass. at 776; *HTA Limited Partnership*, 51 Mass. App. Ct. at 455.

[40] *See Vester*, 281 U.S. at 446-447 (rejecting sovereign's taking under its public purpose review because the mere recital of a public purpose was not rationally related to the taking); *cf. Midkiff*, 467 U.S. at 241; *Kelo*, 125 S.Ct. at 2661-2664; *Vester*, 281 U.S. at 446-447.

[41] This Court has made one passing reference to bad faith throughout its eminent domain jurisprudence but has not used bad faith in the holding of an eminent domain case. *See Carmack*, 329 U.S. at 243-244 (referencing in dicta that a court may set aside an eminent domain taking if the sovereign's agent acted in bad faith).

[42] *See Chelmsford v. DiBiase*, 370 Mass. at 92-93; *Poremba v. City of Springfield*, 354 Mass. at 434.

purpose claims than the Constitutional review by placing an additional burden upon the condemnee.[43] This limited review effectively reduces the protection of the Fifth Amendment because the condemnee has the additional burden before the Massachusetts courts will provide him with that protection.

This Court should not stand idle and allow the Massachusetts courts to set a precedent that is far more lenient to the sovereign and less protective to individual property rights than the minimum Constitutional standard of review. This Court should use this case to clearly enunciate a standard of review in pretextual public purpose claims that include an examination of the rational basis of the posited public purpose.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests this honorable Court to grant this petition for writ of certiorari.

Respectfully submitted,

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[43] *Contrast Midkiff*, 467 U.S. at 241; *and Kelo*, 125 S.Ct. at 2661 *with Benevolent & Protective Order of Elks Lodge No. 65*, 403 Mass. at 551; *Pheasant Ridge*, 399 Mass. at 776; *and HTA Limited Partnership*, 51 Mass. App. Ct. at 455.

App. 1

Commonwealth of Massachusetts

Appeals Court for the Commonwealth at Boston,

(Filed Jun. 16, 2005)

In the case no. 04-P-72

TIMOTHY K. HANNA & another

vs

MASSACHUSETTS TURNPIKE AUTHORITY.

Pending in the Superior Court for the County of Middlesex MICV1997-14161

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

/s/ Ashley Ahearn, Clerk

Date December 23, 2004

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

04-P-72

TIMOTHY K. HANNA & another.[1]

vs.

MASSACHUSETTS TURNPIKE AUTHORITY.

[1] CMA Realty Trust. The Realty Trust did not file a brief.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

Upon review of the briefs and record appendix it has not been made to appear that the entry of summary judgment in the Superior Court was error, or that the court's discovery order, dated June 17, 2002, demonstrated an abuse of discretion.

In an earlier appeal in this matter, this court reversed so much of a judgment entered pursuant to Mass.R.Civ.P. 12(b)(6), 365 Mass. 755 (1974), on the counts of the plaintiffs' complaint alleging that the defendant's eminent domain taking of property located at 1672 Worcester Road in Framingham was not made in good faith. *HTA Ltd. Partnership v. Massachusetts Turnpike Authy.*, 51 Mass. App. Ct. 449, 454-458 (2001). In so doing, this court noted that the plaintiffs' allegations, standing alone, might be insufficient to withstand summary judgment and remanded for further proceedings. *Id.* at 457-458.[2]

On remand, the plaintiffs amended their complaint to add allegations, inter alia, that the defendant's actions were arbitrary and capricious, and unconstitutionally applied (alleging that the defendant was only authorized to take accessible abutting land). A Superior Court judge allowed the defendant's motion for summary judgment, concluding that neither the fact that the plaintiffs' expert disagreed with the defendant's consultant, nor mere underutilization of the locus for the use for which it was

[2] As part of the decision, however, this court did conclude that the taking for a park and ride facility was within the scope of the enabling legislation. See *HTA Ltd. Partnership v. Massachusetts Turnpike Authy.*, 51 Mass. App. Ct. at 454. To the extent that the plaintiffs challenge this presently, the argument would appear to be precluded.

taken, establishes bad faith on the part of the defendant. We agree. We reject, as did the judge, the arbitrary and capricious claim.[3] We conclude that the unconstitutional as applied argument lacks substantive legal force. In addition, we are not persuaded that the judge, who ruled on the plaintiffs' motion to compel further answers to interrogatories, abused her discretion. See *Solimene v. B. Grauel & Co., KG*, 399 Mass. 790, 799 (1987); *Beaupre v. Cliff Smith & Assocs.*, 50 Mass. App. Ct. 480, 485 (2000).

Accordingly, we affirm the judgment for substantially the same reasons as those expressed by the Superior Court judge.

Judgment affirmed.

By the Court (Armstrong, C.J., Brown & Green, JJ.),

/s/ Ashley Ahearn
Clerk

Entered: December 23, 2004.

[3] We also note, as did the judge, that this claim was not properly pursued through administrative proceedings.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 97-4161

TIMOTHY K. HANNA and CMA REALTY TRUST

vs.

MASSACHUSETTS TURNPIKE AUTHORITY

MEMORANDUM OF DECISION AND ORDER ON MASSACHUSETTS TURNPIKE AUTHORITY'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

The background of this case appears in *HTA Limited Partnership v. Massachusetts Turnpike Authority*, 51 Mass. App. Ct. 449 (2001). The Appeals Court there remanded the case for further proceedings on counts alleging that the defendant Authority's taking of the plaintiffs' property was made in bad faith, "solely or dominantly" to confer a benefit on the private owners of the so-called "9/90 Development", rather than for the stated public purpose of a park and ride facility. *Id.* at 454-455, 457-458. Support for such a claim, the Court noted, could include evidence that the taking authority had departed from its usual practices, or that it had previously considered the site unsuitable, or not considered it, for the stated purpose. *Id.* at 456. The Court further noted allegations of the complaint that, if proved, would assist the claim, including that the defendant had departed from common procedural safeguards, and that technical studies known to the Authority had shown the site to be unsuitable for the purpose, while the Authority was aware of alternative sites that would have

met its goals. *Id.* The Court cautioned that such allegations, while sufficient to withstand a motion to dismiss, would not suffice at the stage of summary judgment.

That stage has now arrived. After hearing, and having examined the entire record provided in the light most favorable to the plaintiffs, the Court concludes that the plaintiffs have no prospect of proving that the sole or dominant purpose of the taking was anything other than the stated public purpose of a park and ride facility. Accordingly, the defendant's motion for summary judgment will be allowed.

The Court's review of the record, and consideration of the plaintiffs' arguments, has been substantially hampered by the plaintiffs' approach to presenting the facts, a task governed by Superior Court Rule 9A(b)(5). As required by that rule, the defendant has provided a concise statement setting forth in short numbered paragraphs the subsidiary facts that it contends are undisputed. The plaintiffs' response admits virtually all the facts stated, but goes on in each paragraph to assert a series of qualifications, arguments, and conclusions, with reference to evidentiary material purporting to provide support. This approach does not comply with the rule, either with respect to disputing facts asserted by the moving party or with respect to asserting additional facts. See *Dziamba v. Warner & Stackpole LLP,* 56 Mass. App. Ct. 397, 398-401 (2002). Nevertheless, the Court has reviewed those of the cited materials that have been provided.[1] That review

[1] In some instances the plaintiffs have cited pages of deposition transcripts that they have not provided.

reveals that virtually none of the referenced material supports the proposition for which it is cited.

As to the facts asserted by the defendant, the plaintiffs purport to dispute three. With respect to each of paragraphs 7 and 10, the asserted dispute involves a minor discrepancy in dates, which is resolved in each case by reference to documents provided. As to paragraph 13, the plaintiffs dispute the assertion that the Authority presently intends to expand the park and ride lot on the site to 250 spaces. Among the references provided are none that address the present time, but some that reflect consideration in 1997 of proposals that would have reduced the size of the lot. The defendant's consideration of such proposals in 1997 sheds light neither on its present intentions nor on its intentions at the time of the taking, which is the issue presented in this case. The record thus presents no genuine dispute of material fact.

What the record shows, in substance, is the following. In the early 1990's, the Authority engaged a consultant to evaluate various approaches to reducing the number of vehicles using the Turnpike during peak traffic hours, so as to meet regulatory requirements under the Clean Air Act. The consultant, after gathering and evaluating data, concluded that a park and ride program would meet the need, and projected demand in the area of interchange 12 at 250 spaces. The plaintiffs' expert disagrees with the consultant's methods, and with the conclusions it drew from available data. The Authority, however, accepted those conclusions, and undertook to establish park and ride lots at most turnpike interchanges.

With respect to interchange 12, Authority personnel considered the site and one other potential location, and

selected the site. The site had a significant drawback, in that access between the site and the Turnpike was less than direct, but no evidence indicates that the alternative location considered, or any other potential location, was better in this regard, still less that any alternative was better or even equal financially or in other respects. The plaintiffs refused to sell the site to the Authority, expressing only a willingness to consider a lease "on my terms." The Authority took the site by eminent domain in August of 1994. It did not conduct a public hearing prior to the taking, nor does any evidence indicate any practice of doing so.

Immediately after the taking, the Authority established a park and ride lot for 110 vehicles. The projected 250 users did not materialize, and the lot has been underutilized since its inception. In 1997, some three years after the taking, a developer proposed to the Authority an arrangement under which part of the lot would be used for access to the adjacent "9/90 Development." The Authority engaged in negotiations over that proposal. No evidence indicates that those negotiations ever culminated in any agreement.

As to the allegations cited by the Appeals Court as potentially supporting the claim, the record reveals a lack of supporting evidence. Nothing in the record indicates that the Authority departed from its usual practices or from common procedural safeguards; indeed the evidence is devoid of any basis on which a fact finder could identify any procedures usually employed by the Authority or by other taking authorities in Massachusetts that were not employed in this case. As to the Authority's consideration of the site, the only evidence is that its staff considered this site, along with one other, from the outset of its

planning process for a park and ride lot at interchange 12; nothing suggests that the Authority ever considered the site unsuitable for the purpose, despite recognition of its drawbacks. Nor does any evidence indicate that any technical studies had shown the site to be unsuitable for the purpose. That the plaintiff's expert disagrees with the conclusions reached by the Authority's consultant does not provide such evidence. The evidence offered fails to support plaintiff's claim that the Authority took the site in bad faith, for any purpose other than that stated, and the Authority is entitled to judgment as a matter of law on the two counts of the second amended complaint that are predicated on that claim, counts I and II.

Count III alleges that the taking was arbitrary and capricious. In the eminent domain context, that allegation means nothing more than that the taking was for a purpose not authorized by law. See *Chandler v. County Commissioners of Nantucket County,* 437 Mass. 430, 434 (2002). As discussed, the record here establishes otherwise. Moreover, the proper procedural mechanism for raising that allegation would be an action in the nature of *certiorari,* pursuant to G.L. c. 249, § 4, under which the Court would review the record of the administrative action, without a jury, and without receiving evidence outside that record. See *id.* The plaintiff has not asserted a claim for such review, nor did he meet the sixty day filing deadline for such an action. Accordingly, the defendant is entitled to judgment as a matter of law on Count III.

Count IV of the Second Amended Complaint, added after remand from the Appeals Court, alleges that the taking was an "unconstitutional application" of the Authority's statutory eminent domain power "because Turnpike travelers must leave the Turnpike road in order to

utilize the Subject Property." The theory underlying this claim, as explicated in the plaintiff's arguments in support of his cross-motion for partial summary judgment, is that the Authority's enabling act "impliedly authorizes takings only of directly accessible abutting land." No such limitation appears in the language of the enabling act, nor does either case law or common sense support its implication.

The pertinent provisions of the Authority's enabling act appear at sections 5(f), (k), and (p) of chapter 354 of the act of 1952. These provisions authorize the Authority:

> (f) To acquire sites abutting on the turnpike and to construct or contract for the construction of buildings and appurtenances for gasoline stations, restaurants and other services and to lease the same for the above purposes in such manner and under such terms as it may determine;
>
> * * *
>
> (k) To acquire . . . by the exercise of the power of eminent domain . . . any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike . . .
>
> * * *
>
> (p) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

Soon after its enactment, the Justices of the Supreme Judicial Court opined that the Act did not exceed the

Legislature's power to delegate, and did not violate the restrictions in article ten of the declaration of rights on takings for highway purposes of "more land and property than are needed for the actual construction of such highway or street." See *Opinion of the Justices*, 330 Mass. 713, 719-725 (1953). In reaching these conclusions, the Court noted the important differences between the Turnpike and more conventional roads, and the consequent necessity for the Turnpike to have broad powers to provide a range of facilities and services beyond the road itself. See *id.* at 723-725. In keeping with that opinion, the Appeals Court in this very case has recognized that the provision of a park and ride lot is a legitimate public purpose authorized by the enabling act. See *HTA Limited Partnership v. Massachusetts Turnpike Authority*, 51 Mass. App. Ct. at 453-454.

The statutory language limits the Authority's taking power to abutting property, taken for the specified purposes. Within those limitations, the power granted is broad, with discretion to evaluate necessity and convenience conferred on the Authority, rather than on any reviewing Court. No limitation to directly accessible property appears. Nor would such a limitation be consistent with the apparent purposes of the grant of powers to the Authority. The Authority could reasonably conclude that parking facilities located outside the direct confines of the Turnpike offer practical and safety advantages: travel lanes and ramps need not be disrupted by vehicles turning in and out of parking areas, and users need not pay tolls to enter, and then later travel to the next interchange to exit.

The plaintiff suggests that the use of this site as a park and ride lot does not serve to preserve and protect

the Turnpike, because the lot is open to the public generally, and not limited to Turnpike users. Nothing in the enabling act, however, compels the Authority to limit use of its facilities to users of the Turnpike, as long its [sic] purpose in establishing the facilities is to serve interests of the Turnpike. As discussed *supra*, the record before the Court establishes beyond dispute that the Authority's purpose in taking the site was to establish a park and ride lot for use by Turnpike commuters, so as to reduce the number of vehicles using the Turnpike. The Appeals Court has already held that purpose to be authorized by the enabling act. Accordingly, the Authority is entitled to judgment as a matter of law on Count IV.

Count V of the Second Amended Complaint, also added after remand, alleges that the land taken "consists of more land than was needed to construct and operate the 'park and ride facility,'" and that the Authority "knew or should have known that it took more land . . . than it needed." In support of this allegation, the plaintiffs rely on the opinion of their expert that the site is bigger than needed for 250 parking spaces, and that "realistic demand" was far less than that number. This evidence fails to support the allegations, for the same reasons discussed *supra*; that the plaintiffs' expert disagrees with the Authority's determination of how much land to take does not render that determination improper. The legislature has delegated to the Authority, not to the plaintiffs or the Court, the discretion to determine its needs. See *City of Boston v. Talbot*, 206 Mass. 82, 90 (1910) (transit authority's "exercise of delegated legislative authority and its final judgment in determining what property it was expedient to take to accomplish the strictly public purpose

for which the taking was made are not subject to revision"). Nothing in the record suggests that the Authority did not exercise its discretion in good faith.[2]

The plaintiffs' memoranda expand on the allegations of count V, contending that the Authority took not only more acreage, but also a greater interest than necessary. The plaintiffs argue that a leasehold would have sufficed, citing evidence that the Authority leased land for park and ride lots in other locations. This aspect of the argument fails for the same reasons already discussed, and for the additional reason that nothing in the record indicates any terms on which the plaintiffs would have leased the land, beyond plaintiff Hanna's reference to "my terms." Even if the Court were empowered to second-guess the Authority's decision to take the land rather than lease it, the Court could hardly do so without a factual basis for comparison. The defendant is entitled to judgment as a matter of law on count V.

CONCLUSION AND ORDER

For the reasons stated, the Massachusetts Turnpike Authority's Motion for Summary Judgment is ***ALLOWED,***

[2] Whether a taking authority's exercise of discretion as to the amount of land to take might be subject to judicial review for abuse of discretion, in an action in the nature of *certiorari*, is a question not presented in this case; the plaintiffs did not seek such review, which, as noted *supra*, would have been limited to the record of the Authority's proceedings.

and the Plaintiffs' Cross-Motion for Partial Summary Judgment is ***DENIED.***

/s/ Judith Fabricant
Judith Fabricant
Justice of the Superior Court

May 16, 2003

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
BOSTON, MASSACHUSETTS 02108-1705
(617) 725-8106

April 26, 2005

Michael A. Laurano, Esquire
15 Court Square, Suite 360
Boston, MA 02108

RE: No. 2004-P-0072

TIMOTHY K. HANNA & others
vs.
MASSACHUSETTS TURNPIKE AUTHORITY

NOTICE OF DOCKET ENTRY

Please take note that on April 25, 2005, the following entry was made on the docket of the above-referenced case:

ORDER: Denial of petition for rehearing. (CJA B GN, JJ.) Notice/Image

Very truly yours,

The Clerk's Office

Dated: April 26, 2005

To: Michael A. Laurano, Esquire
Jeffrey S. Follett, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

04-P-72

TIMOTHY K. HANNA & others

vs.

MASSACHUSETTS TURNPIKE AUTHORITY

ORDER

The petition for rehearing filed by the appellant, Timothy K. Hanna, having been considered, it is ordered that the said petition be and it hereby is denied.

By the Court (Armstrong, C.J., Brown & Green J.J.)

/s/ Gilbert P. Lima, Jr.
First Assistant Clerk

Entered: 25 April 2005

Supreme Judicial Court for the Commonwealth of
Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400,
Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Michael A. Laurano, Esquire
15 Court Square, Suite 360
Boston, MA 02108

RE: Docket No. FAR-14621

TIMOTHY K. HANNA & others
vs.
MASSACHUSETTS TURNPIKE AUTHORITY

Middlesex Superior Court No. MICV1997-04161
A.C. No. 2004-P-0072

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 06/09/05, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: June 9, 2005

To: Michael A. Laurano, Esquire
Jeffrey S. Follett, Esquire

U.S. Constitution: Bill of Rights

Fifth Amendment – Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS

PART THE FIRST
A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts.

Article X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be

appropriated to public uses, he shall receive a reasonable compensation therefor.

---

28 U.S.C. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

MASSACHUSETTS APPEALS COURT RULES

RULE 1:28 SUMMARY DISPOSITION

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18 and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of

an appellant and may, by its written order, affirm, modify or reverse the action of the court below. The panel need not provide an opportunity for oral argument before disposing of cases under this rule. Any order entered under this rule shall be subject to the provisions of Rule 27 and 27.1 of the Massachusetts Rules of Appellate Procedure.

Adopted June 26, 1975, effective September 8, 1975. Amended February 28, 1978, effective March 2, 1978; amended effective September 25, 1980; amended April 28, 1998, effective September 1, 1998.

Spec. L. C. S75 ANNOTATED LAWS OF MASSACHUSETTS § 1

§ 1. Massachusetts Turnpike.

The Massachusetts Turnpike Authority (hereinafter created) is hereby authorized and empowered, subject to the provisions of this act, to construct, maintain, repair and operate at such location as may be approved by the state department of public works a toll express highway, to be known as the "Massachusetts Turnpike", from a point in the vicinity of the city of Boston or from a point or points within said city to a point at or near the boundary line between the Commonwealth and the State of New York or such part or parts thereof as it may determine, and to issue turnpike revenue bonds of the Authority, payable solely from revenues, to finance such turnpike.

§ 2. Credit of Commonwealth not Pledged.

Turnpike revenue bonds issued under the provisions of this act shall not constitute a debt of the commonwealth

or of any political subdivision thereof or a pledge of the faith and credit of the commonwealth or of any such political subdivision, but such bonds shall be payable solely from the funds herein provided therefor from revenues. All such turnpike revenue bonds shall contain on the face thereof a statement to the effect that neither the commonwealth nor the Authority shall pay the same or the interest thereon except from revenues of the turnpike and that neither the faith and credit nor the taxing power of the commonwealth or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds.

All expenses incurred in carrying out the provisions of this act shall be payable solely from funds provided under the authority of this act and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been provided under the provisions of this act.

§ 3. Massachusetts Turnpike Authority.

There is hereby created and placed in the state department of public works a body politic and corporate to be known as the "Massachusetts Turnpike Authority", which shall not be subject to the supervision and regulation of the department of public works or of any other department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality, and the exercise by the Authority of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be

deemed and held to be the performance of an essential governmental function.

The Massachusetts Turnpike Authority shall consist of three members, to be appointed by the governor, who shall be residents of the commonwealth, not more than two of whom shall be of the same political party. The members of the Authority first appointed shall continue in office for terms expiring on July first, nineteen hundred and fifty-eight, July first, nineteen hundred and fifty-nine and July first, nineteen hundred and sixty, respectively, the term of each such member to be designated by the governor, and until their respective successors shall be duly appointed and qualified. The governor shall designate one of the members as chairman who shall serve as such during his term of office. Upon the expiration of the term of office of such chairman, the governor shall appoint one of the members as his successor as chairman. The successor of each member shall be appointed for a term of eight years, except that any person appointed to fill a vacancy shall serve only for the unexpired term. Any member of the Authority shall be eligible for reappointment. Each member of the Authority before entering upon his duties shall take an oath before the governor to administer the duties of his office faithfully and impartially, and a record of such oaths shall be filed in the office of the secretary of the commonwealth.

The Authority shall elect one of the members as vice chairman thereof and shall also elect a secretary-treasurer who need not be a member of the Authority. Two members of the Authority shall constitute a quorum and the affirmative vote of two members shall be necessary for any action taken by the Authority. No vacancy in the membership of the Authority shall impair the right of a quorum to

exercise all the rights and perform all the duties of the Authority.

Before the issuance of any turnpike revenue bonds under the provisions of this act, each member of the Authority shall execute a surety bond in the penal sum of twenty-five thousand dollars, and the secretary treasurer shall execute a surety bond in the penal sum of fifty thousand dollars, each such surety bond to be conditioned upon the faithful performance of the duties of his office, to be executed by a surety company authorized to transact business in the commonwealth as surety and to be approved by the attorney general and filed in the office of the secretary of the commonwealth. In addition to the salary provided in the last paragraph of section four of chapter five hundred and ninety-eight of the acts of nineteen hundred and fifty-eight, the chairman of the authority shall receive an annual salary of forty-one thousand seven hundred and thirty dollars and the other members shall receive an annual salary of twenty-two thousand and eighty dollars. Each member shall be reimbursed for his actual expenses necessarily incurred in the performance of his duties. All expenses incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been provided under the authority of this act.

The Authority may indemnify any member, officer or employee from personal expense or damages incurred, arising out of any claim, suit, demand or judgment which arose out of any act or omission of the individual including the violation of the civil rights of any person under any federal law, if at the time of such act or omission the

member, officer or employee was acting within the scope of his official duties or employment; provided that the defense or settlement of such claim shall have been made by the resident counsel of the Authority, by an attorney retained for such purpose by the Authority, or by an attorney provided by an insurer obligated under the terms of a policy of insurance to defend against such claims.

* * *

§ 5. General Grant of Powers.

The Authority is hereby authorized and empowered –

(a) To adopt by-laws for the regulation of its affairs and the conduct of its business;

(b) To adopt an official seal and alter the same at pleasure;

(c) To maintain an office or offices at such place or places within the commonwealth as it may determine;

(d) To sue and be sued in its own name, plead and be impleaded;

(e) To construct, reconstruct, maintain, repair and operate the turnpike or any part or parts thereof as it may determine, and the provisions of chapter ninety-one of the General Laws shall not apply to the construction by the Authority of structures in, on or over rivers, streams and waterways; provided, that for drainage areas greater than one thousand acres the said structures shall be designed to pass a rare flood as computed by the Kinnison-Colby formula, and for drainage areas of one thousand acres or less, the said structures shall be designed to meet the requirements of the "Massachusetts Turnpike Drainage

Standards" dated June fourth, nineteen hundred and fifty-four.

(f) To acquire sites abutting on the turnpike and to construct or contract for the construction of buildings and appurtenances for gasoline stations, restaurants and other services and to lease the same for the above purposes in such manner and under such terms as it may determine;

(g) To issue turnpike revenue bonds of the Authority for any of its corporate purposes, payable solely from the tolls and revenues pledged for their payment, and to refund its bonds, all as provided in this act;

(h) To fix and revise from time to time and charge and collect tolls for transit over the turnpike, and it shall upon request furnish a user of the turnpike a toll receipt showing the amount of toll paid, the classification of the vehicle and the date and place of exit from said turnpike.

(i) To establish rules and regulations for the use of the turnpike not repugnant to the provisions of the General Laws made applicable thereto by section fifteen, and to provide penalties for the violation of said rules and regulations in which, except as provided in section fifteen C, shall not exceed five hundred dollars for each offense, which may be recovered by indictment or by complaint before a district court eighty per cent of which shall be accounted for and paid to the Authority.

(j) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

(k) To acquire in the name of the Authority by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the

power of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws or any alternative method now or hereafter provided by general law, in so far as such provisions may be applicable, such public lands, parks, playgrounds, reservations, cemeteries, highways or parkways, or parts thereof or rights therein, and any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike; provided, however, that whenever a parcel of private property so taken is used in whole or part for residential purposes, the owner or owners of said parcel may, within thirty days of the date of the Authority's notice to vacate such parcel, appeal to the Authority for a postponement of the date set for vacating, whereupon the Authority shall grant to the owner or owners of the property a postponement of three months from the date of such appeal; provided, however, that the appeal for such postponement shall be in the form of a written request to the Authority sent by registered mail, return receipt requested; and provided, further, that the Authority shall give security to the state treasurer, in such amount and in such form as may be determined by the state department of public works, for the payment of such damages as may be awarded in accordance with law for such taking, and that the provisions of section forty of said chapter seventy-nine, in so far as the same may be applicable, shall govern the rights of the Authority and of any person whose property shall be so taken;

(l) To designate the locations, and establish, limit and control such points of ingress to and egress from the

turnpike as may be necessary or desirable in the judgment of the Authority to insure the proper operation and maintenance of the turnpike, and to prohibit entrance to the turnpike from any point or points not so designated;

(m) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act; provided, that sections twenty-six to twenty-nine, inclusive, and sections forty-four A to forty-four L, inclusive, of chapter one hundred and forty-nine of the General Laws and sections thirty-nine F to thirty-nine M, inclusive, of chapter thirty of the General Laws shall apply to contracts of the Authority to the same extent and in the same manner as they are applicable to the commonwealth. All general or special laws, or parts thereof, inconsistent herewith, are hereby declared to be inapplicable to the provisions of this act. Notwithstanding the provisions of this clause, the Authority may, with the approval of the secretary of transportation and construction or his designee, without competitive bids and notwithstanding any general or special law, award a contract, otherwise subject to this section, limited to the performance of emergency repairs necessary to preserve the safety of persons or property.

(n) To employ consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary in its judgment, and to fix their compensation;

(o) To receive and accept from any federal agency grants for or in aid of the construction of the turnpike, and to receive and accept aid or contributions from any source of

either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made; and

(p) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

(q) Any sale of real property shall be awarded, after advertisement for bids, to the bidder who is the highest responsible bidder. The authority shall have the right to reject all bids and to readvertise for bids. Before any real property shall be so sold or conveyed notice that such real property is for sale shall be publicly advertised in two daily newspapers published in the city of Boston, and, if such real property is located in any other city or town, in a newspaper published in such other city or town, once a week for three successive weeks. Such advertisements shall state the time and place where all pertinent information relative to the real property to be sold or conveyed may be obtained, and the time and place of opening the bids in answer to said advertisements, and that the authority reserves the right to reject any or all such bids. All bids in response to advertisements shall be sealed and shall be publicly opened by the authority. The authority may require, as evidence of good faith, that a deposit of a reasonable sum, to be fixed by the authority, accompany the proposals. This clause shall not be applicable to any sale of real property by the Authority to the commonwealth or any city, town or public instrumentality nor to a sale of real property which is determined by the Authority to have a fair market value of five thousand dollars or less.

7.37: MB High Occupancy Vehicle Lanes

(1) *Applicability.* 310 CMR 7.37 applies to the Massachusetts Executive Office of Transportation and Construction, hereafter referred to as EOTC, and the Massachusetts Turnpike Authority.

(2) *High Occupancy Vehicle Lanes.*

(a) By December 31, 1991, EOTC shall construct and make available for public use, high occupancy vehicle lanes on the roadway segments described as follows:

1. The existing southbound high occupancy vehicle lane on Interstate-93, north of the southern bank of the Charles River, shall be extended toward Interstate-95/Route 128 to the northernmost point appropriate to maximize use of the lane. Said extension shall be subject to the following conditions:

a. Establishment of a high occupancy vehicle lanes shall not be accomplished by the addition of a new lane or lanes to Interstate-93.

b. Prior to the lane opening, EOTC shall submit to the Department information relating to the length of the lane including a demonstration that the lane has been extended northward to the most appropriate geographical location.

2. The final design of the Charles River Crossing portion of the Central Artery/Third Harbor Tunnel project on Interstate-93 shall include a high occupancy vehicle lane on the southbound side of Interstate-93 extending down the exit ramp to Nashua Street with a head-of-queue enforcement point at the

intersection of the Interstate-93 ramp and Nashua Street. This high occupancy vehicle lane shall be made available for public use at the time the Charles River Crossing of the Central Artery/Third Harbor Tunnel project is opened for public use.

(b) By May 31, 1993, EOTC shall construct and make available for public use high occupancy vehicle lanes northbound and southbound on Interstate-93 beginning at the intersection of Interstate-93 with Interstate-90 and extending to a point immediately north of the intersection of Interstate-93 and Route 3. Said high occupancy vehicle lanes shall be established subject to the following conditions:

1. High occupancy vehicle lanes on this roadway segment shall be implemented when the roadway threshold standards established in compliance with the requirements of 310 CMR 7.37(3) have been violated for three consecutive months in accordance with provisions of 310 CMR 7.36(5)(b).

2. High occupancy vehicle lanes on this roadway segment shall be subject to earlier implementation if EOTC determines that roadway threshold standards established pursuant to 310 CMR 7.37(5)(b).

(3) *Establishment of Roadway Threshold Standards.*

(a) Before December 31, 1991, EOTC shall establish roadway threshold standards for each of the following roadway segments:

1. Interstate-93 northbound and southbound between Interstate-90 and Route 3 in Braintree.

2. Interstate-93 northbound between the Charles River Crossing and Interstate-95.

(b) Before December 31, 1991, the Massachusetts Turnpike Authority shall establish roadway threshold standards for the following roadway segment:

1. Interstate-90 eastbound and westbound between Interstate-93 and Interstate-95.

(c) Before December 31, 1991, EOTC and the Massachusetts Turnpike Authority shall each collect such information as is necessary to identify and document baseline roadway conditions for the roadway segments identified in 310 CMR 7.37(3)(a) and (b).

(d) Roadway threshold standards shall be calculated to represent an average weekday peak hour trip time increase of 35 percent from baseline roadway conditions.

(e) Before January 1, 1992, EOTC and the Massachusetts Turnpike Authority shall each submit to the Department a report which documents the baseline roadway conditions and the roadway threshold standards for the roadway segments identified in 310 CMR 7.37(3)(a) and (b). Said report shall contain traffic monitoring data and trip time records as may be appropriate to support the roadway threshold standards as established. Within 60 days of receipt of a complete report, the Department shall review the report and shall take such action on the report as it may deem appropriate. Any action such shall be in writing. Within 90 days of receipt of a complete report the Department shall file a copy of the report and Department action with U.S. EPA, Region I.

(4) *Feasibility studies.*

(a) Before December 31, 1992, EOTC shall, in consultation with the Massachusetts Department of Public Works and the Massachusetts Turnpike Authority and after an opportunity for public review and comment, submit to the Department a study of the feasibility of establishing high occupancy vehicle lanes and other high occupancy vehicle incentives for the roadways identified in 310 CMR 7.37(3)(a) and (b).

(b) Feasibility studies required by this section shall identify the impact of high occupancy vehicle lane installation on general-purpose traffic flow and mobile source emissions for each roadway segment in addition to an assessment of the appropriate engineering issues.

(5) *Roadway Monitoring/Addition of High Occupancy Vehicle Lanes.*

(a) Beginning January 1, 1992, EOTC and the Massachusetts Turnpike Authority shall monitor traffic volumes and trip times on the roadway segments identified in 7.37(3)(a) and (b) monthly. All records and data shall be maintained for a period of five years and shall be readily available for Department inspection.

(b) Should roadway threshold standards established pursuant to 310 CMR 7.37(3) be violated for three consecutive months, EOTC shall notify the Department of the violation, said notification shall include identification of the roadway which has exceeded roadway threshold standards which requires implementation of high occupancy vehicle lanes, and a schedule for implementing high occupancy vehicle lanes for the applicable roadway segment.

(c) The addition of high occupancy vehicle lanes to roadways pursuant to 310 CMR 7.37(5)(b) shall be subject to the following conditions:

1. Addition of high occupancy vehicle lanes on Interstate-93 northbound and southbound between Interstate-90 to Route 3, shall extend onto Route 3 if found feasible through the study conducted pursuant to 310 CMR 7.37(4). Should implementation of high occupancy vehicle facilities on this section of Interstate-93 or Route 3 require addition of a new lane or lanes, any such high occupancy vehicle lane shall be dedicated for exclusive high occupancy vehicle use between the hours of 6 am to 10 am and 3 pm to 7 pm, at a minimum.

2. Addition of high occupancy vehicle lanes on Interstate-90 eastbound or Interstate-90 westbound between Interstate-93 and Intersate-95 must first be found feasible through the study conducted pursuant to 310 CMR 7.37(4)(a)1. Implementation of addition of high occupancy vehicle facilities shall not be accomplished by addition of a new lane or lanes to Interstate-90.

3. Addition of high occupancy vehicle lanes on Interstate-93 northbound beginning at the Charles River Crossing and extending north towards Interstate-95 to a point which is appropriate to maximize use of the lane. Incorporation of additional high occupancy vehicle lanes shall not be accomplished by the addition of a new lane or lanes to Interstate-93 in this area.

(d) Beginning January 1, 1992, EOTC and the Massachusetts Turnpike Authority shall provide the Department an annual assessment of the potential for violations of the roadway threshold standards. The assessment shall be based on monitoring information collected pursuant to 310 CMR 7.37(5)(a) and traffic projections using a method which has been agreed to in advance through consultation with the Department. The annual assessment shall, at minimum, forecast when roadway threshold standards will be violated on the roadway segments identified in 310 CMR 7.37(3)(a) and (b) and, if roadway threshold standards have already been violated, identify the time of day and travel conditions which were evident when threshold conditions were violated.

(6) *High Occupancy Vehicle Lane Performance Standards.*

(a) Within 30 days of implementation of a new high occupancy vehicle lane or expansion of an existing high occupancy vehicle lane, EOTC shall establish written performance standards for high occupancy vehicle lanes on each of the following roadway segments:

1. From a point beginning at the intersection of Interstate-95 and Interstate-93 north of Boston and extending south on Interstate-93 to the Charles River Crossing. Said performance standard shall be established to represent the average peak hour travel time during the period of maximum construction activity of the Central Artery project, which is expected to occur during calendar year 1994.

2. Beginning at the Weymouth Town Lane on Route 3, via Interstate-93 to South Station in calendar year 1994. Said performance standard shall be established to represent the average peak hour travel time during the period of maximum construction activity of the Central Artery project, which is expect [sic] to occur during calendar year 1994.

3. Beginning at the Weymouth town line on Route 3, via Interstate-93 and Interstate-90 to the entrance to Logan Airport after Central Artery Construction is complete in the year 2002. Said performance standard shall be established to represent the average peak hour travel time during the period of maximum construction activity of the Central Artery project, which is expect [sic] to occur during calendar year 1994.

(b) Within 30 days of implementation of a new high occupancy vehicle lane on Interstate-90, the Massachusetts Turnpike Authority, in consultation with EOTC, shall establish written performance standards for each high occupancy vehicle lane on roadway segments described as follows:

1. From a point beginning at the intersection of Interstate-95 and Interstate-93 north of Boston through the Sumner and Callahan Tunnels to the entrance to Logan Airport after the Central Artery Construction is complete in the year 2002.

2. From a point beginning at the interchange of Interstate-95 and Interstate-90 to South Station during the central Artery Construction period in the year 1994.

3. From a point beginning at the interchange of Interstate-95 and Interstate-90 extending east along Interstate-90 to the entrance to Logan Airport after Central Artery construction is complete in the year 2002.

(c) Within 60 days of the implementation of a new high occupancy vehicle lane or expansion of an existing lane, EOTC shall submit to the Department a report which documents the high occupancy vehicle lane performance standards for the roadway segments identified in 310 CMR 7.37(5)(a). Said report shall contain traffic monitoring data and trip time records as may be appropriate to support the high occupancy vehicle lane performance standard for each roadway segment and shall be subject to review as follows:

1. Within 60 days of receipt of a complete roadway performance standard report, the Department shall review the report and shall take action to either approve or disapprove said proposed report in writing.

2. Within 90 days of receipt of a complete roadway performance standards report the Department shall file a copy of the report and Department action with U.S. EPA, Region I.

(d) Performance standards, as required by this section shall be established to reflect roadway performance at a level the Department has determined is reasonable. This level shall be defined as the range of roadway performance between Level of Service B and a condition of under-utilization. A high occupancy vehicle lane shall be considered under-utilized if traffic volumes fall below 400 vehicles per hour for

a high occupancy vehicle lane with a traffic flow direction which remains constant or 200 vehicles per hour for a high occupancy vehicle lane where the direction of traffic flow changes to match the predominant peak hour traffic flow direction.

(7) *Continuous Attainment of Performance Standards.*

(a) Beginning January 1, 1992, EOTC and the Massachusetts Turnpike Authority shall monitor high occupancy vehicle lane performance on the lanes for which they are responsible on a continuous basis to ensure that high occupancy vehicle operations and opportunities are maximized. Trip times shall be measured at least quarterly. Measurements shall be taken on five to seven weekdays over two consecutive weeks within each quarter. A minimum of three time runs shall be made in each direction for each high occupancy vehicle lane roadway segment on each of the sample days.

(b) EOTC and the Massachusetts Turnpike authority shall use all appropriate measures on a continual basis to maintain compliance with the high occupancy vehicle lane performance standards.

(c) Should high occupancy vehicle lane performance standards for a given roadway segment be violated for each time run conducted in accordance with the provisions of 310 CMR 7.37(6)(a), the agency responsible for the operation of the lane, either EOTC or the Massachusetts Turnpike Authority, shall file a written report describing the violations to the Department within ten days following the end of month in which the violation was detected. This report shall include a commitment by the responsible agency to take

whatever measures are necessary to return the high occupancy vehicle land to compliance with the performance standards, including but not limited to changes in high occupancy vehicle eligibility or high occupancy vehicle facility metering and measures to increase the use of busses and/or car and van-pools.

(8) *Substitute High Occupancy Vehicle Projects.*

(a) Based on the feasibility studies conducted pursuant to 310 CMR 7.37(4)(a), if EOTC can demonstrate to the Department that a specific project listed in 310 CMR 7.37(3)(a) and (b) is infeasible due to associated adverse engineering, environmental or economic impacts, an alternative project may be substituted in the following manner:

1. EOTC must petition the Department to accept a substitution project, said petition to include a demonstration that the alternative project achieves equal or greater emission reductions of NMHC, CO and NOx and would provide a greater improvement in air quality for CO and NOx in the area where the required high occupancy vehicle lane was targeted, both short and long term.

2. Within 60 days of receipt of a complete petition and demonstration for project substitution, the Department shall review the proposed substitution and shall take action on the proposed substitution in writing.

3. Within 90 days of receipt of a complete petition and demonstration for project substitution, the Department shall file a copy of the petition, supporting documentation and Department action with U.S. EPA, Region I.

(9) *High Occupancy Vehicle Studies and Further Actions.*

(a) The Massachusetts Turnpike Authority shall take all steps necessary to enhance and expand programs to support high occupancy vehicle and shall undertake to complete and submit to the Department the following feasibility studies no later than December 31, 1992:

1. A study to examine the feasibility of full-scale high occupancy vehicle lanes and other high occupancy vehicle facilities and mechanisms on Interstate-90 between Interstate-95 and Interstate-90 in Boston.

2. A study on the feasibility of implementing a program of special high occupancy vehicle toll booths and full head-of-queue privileges on Interstate-90 including consideration of establishing specially demarcated lanes leading to high occupancy vehicle toll booths wherever found practical at appropriate turnpike interchanges.

3. A study on the feasibility of installing electronic identification systems to facilitate high occupancy vehicle flow through turnpike toll booths.

(10) *High Occupancy Vehicle Promotion and Enforcement.*

(a) Before December 31, 1991 EOTC and the Massachusetts Turnpike Authority shall each prepare and submit to the Department a plan defining the enforcement program which shall be put into operation to enforce the use of the high occupancy vehicle system. These program submittals shall include a commitment to implementation of the

enforcement program as defined therein. Within 30 days of receiving the enforcement program plans, the Department shall review and make recommendations regarding the plans, said recommendations shall be incorporated by the EOTC and the Massachusetts Turnpike Authority into the final Enforcement program plan for each agency.

(b) By April 1, 1992 EOTC and the Massachusetts Turnpike Authority shall prepare and submit to the Department a plan for a program designed to promote high occupancy vehicle use. Said plan shall be based on a comprehensive review of techniques used to manage or promote high occupancy vehicle use in other locations throughout the United States and Canada. EOTC and the Massachusetts Turnpike Authority shall, in said program, commit to implementation of selected measures to promote use of the high occupancy vehicle system of each agency.

(11) *High Occupancy Vehicle Expansion to the Local Roadway Network.*

(a) EOTC shall encourage the City of Boston to incorporate high occupancy vehicle facilities, including special bus and/or taxi lanes into the design, construction and reconstruction of city streets wherever feasible.

(b) EOTC shall work with the Massachusetts Port Authority to conduct studies of high occupancy vehicle needs at Logan Airport.

7.38: Certification of Tunnel Ventilation Systems in the Metropolitan Boston Air Pollution Control District

(1) *Applicability.*

(a) The requirements of 310 CMR 7.38 shall apply to the construction and operation of any tunnel ventilation system for highway projects proposed to be built in the Metropolitan Boston Air Pollution Control District, construction of which begins on or after January 1, 1991, including, but not limited to, the Central Artery/Third Harbor Tunnel project. The requirements of 310 CMR 7.38 apply in addition to requirements to implement guidelines of the Department to ensure comprehensive and systematic air quality analysis of highway projects, and all other review procedures applicable to highway projects pursuant to the State.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

TIMOTHY K. HANNA and CMA REALTY TRUST, Plaintiffs,	
v.	Civil Action No. 97-4161
MASSACHUSETTS TURNPIKE AUTHORITY, Defendant.	

SECOND AMENDED COMPLAINT

This is an action seeking to rescind an invalid taking of real property pursuant to the power of eminent domain and to recover damages for unlawful acts of the Defendant Massachusetts Turnpike Authority.

PARTIES

1. Plaintiff Timothy K. Hanna ("Hanna") is an individual residing at 153 Prospect Street, Framingham, Massachusetts.

2. Plaintiff CMA Realty Trust ("CMA") is a real estate trust created pursuant to the laws of the Commonwealth of Massachusetts and recorded at Book 24674, Page 455, Middlesex South Registry of Deeds. Plaintiff Hanna is co-trustee and a beneficiary of CMA.

3. Defendant Massachusetts Turnpike Authority (the "Turnpike Authority") is a corporation organized under and created by the laws of the Commonwealth of Massachusetts.

* * *

53. The Subject Property is the only access to approximately 24 acres of isolated land within the ovals of the interchange ramps owned by the Turnpike Authority, located at the rear of the Subject Property.

54. In January 1997, former Governor Edward King met with representatives of Boston Properties on behalf of the Turnpike Authority in pursuit of the development of 24 acres of turnpike land located within the oval of the interchange ramps south of the turnpike roadway, to the rear of the Subject Property

55. Without submitting the proposal to bid as required by Mass. Gen. Laws c. 81A, § 4 and c. 149, § 44A, the Turnpike Authority entered into a lease with Boston Properties, Inc. which plans to construct a hotel and office park on the ovals of land isolated by the interchange ramps south of the Turnpike roadway. The hotel and office park will not be directly accessible from the Turnpike road.

56. The Turnpike Authority authorized the construction of an access road across the Subject Property approaching the 9190 Development site and a connector bridge from the Subject Property to the isolated ovals of Turnpike Authority land leased to Boston Properties.

COUNT I

Violation of U.S. Constitution and Article X of the Massachusetts Declaration of Rights: Government Taking of Private Land For Improper Private Purpose

57. The allegations set forth in paragraphs 1 through 50 are restated and incorporated herein by reference.

58. The Turnpike Authority has taken the private property of the Plaintiffs in bad faith and for an improper

private purpose, in violation of the United States Constitution and in violation of Article X of the Massachusetts Declaration of Rights.

COUNT II

Use of the Subject Property as a Conduit to the 9/90 Development or the Boston Properties, Inc. Development Is An Improper, Inconsistent, and Unauthorized Non-Public Use

59. The allegations set forth in paragraphs 1 through 52 above are restated and incorporated herein by reference.

60. The Turnpike Authority publicly stated that it took the Subject Property to construct a "park and ride" facility to be used by commuters on the turnpike and Route 9 in order to satisfy its obligations under the Federal Clean Air Act and the corresponding State Implementation Plan.

61. The Turnpike Authority's publicly alleged purpose was pretextual, and its true and actual purpose for taking the Subject Property was to confer a benefit upon the private owners of the 9/90 Development and to facilitate access to approximately 24 acres of isolated Turnpike Authority land for future private development for non-Turnpike related purposes.

62. The use of the Subject Property, which had been taken by eminent domain for use as a "park and ride" facility, as a conduit to benefit the 9/90 Development and the leasing of 24 acres of Turnpike Authority land are improper inconsistent uses not authorized by the legislature.

COUNT III

The Taking of the Subject Property By Eminent Domain Was Arbitrary and Capricious

63. **The allegations of paragraphs 1 through 56 above are restated and incorporated herein by reference.**

* * *

COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS

Supreme Judicial Court
(Appeals Court No. 04-P-72)

TIMOTHY K. HANNA,
Plaintiff-Appellant

v.

MASSACHUSETTS TURNPIKE AUTHORITY,
Defendant-Appellee.

APPLICATION FOR PLAINTIFF-APPELLANT'S, TIMOTHY K. HANNA, TO OBTAIN FURTHER APPELLATE REVIEW

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

Michael A. Laurano
BBO #288200
15 Court Square, Suite 360
Boston, MA 02108
(617) 523-4499

January 20, 2005

* * *

FURTHER APPELLATE REVIEW IS APPROPRIATE

An invented public use gloss can be put on virtually any taking of land, no matter its nature turning the public use requirement then into a matter of whether the sovereign has a "stupid staff." See *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1025 n. 12 (1992). As the Court further pointed out in Lucas, "[t]he takings clause requires courts to do more than insist upon artful justification." Id.

The public interest and the interest of justice are triggered where the question is what protection does the 5th Amendment and Article X of the Massachusetts Declaration of Rights afford individuals in condemnation cases where the sovereign knows the public use posited would fail.

The justification for an eminent domain taking must be supported by a proper and valid factual basis, or the taking is invalid and in bad faith. *Pheasant Ridge Assoc., LTD v. Town of Burlington*, 399 Mass. 771, 775-77 (1987). The right to take private property for a public use is limited by public necessity; thus, "where the necessity stops there stops the right to take, both as to amount of land and the nature of the interest therein." *In re Winnisimmet Co.*, 209 Mass. 1, 2 (1911).

The plaintiff challenged defendant's Park & Ride "strategic" decision making process as foundationless and

* * *

MASSACHUSETTS TURNPIKE AUTHORITY
10 Park Plaza, Suite 5170
Boston, MA 02116
(617) 248-2800

ORDER OF TAKING

At a duly called meeting of the Massachusetts Turnpike Authority held this 9th day of August, 1994, the following is voted:

The Massachusetts Turnpike Authority, acting pursuant to powers granted under Chapter 354 of the Acts of 1952 and all other general or special laws thereto enabling, does hereby take the FEE SIMPLE INTEREST in real property located at 1672 Worcester Road in the Town of Framingham, more particularly described in Exhibit A, attached to this vote and presented to the Board at the meeting at which this vote is taken. The Authority does hereby also take all buildings, trees and other appurtenances to said real property. The Authority takes this FEE SIMPLE INTEREST for the purposes of developing a commuter parking lot in order to operate the turnpike in a safe and efficient manner and to comply with provisions of the Clean Air Act and regulations of the Massachusetts Department of Environmental Protection.

An award of One Million Four Hundred Thousand ($1,400,000) and no/100 is made for damages sustained by the persons having an interest in said real property, by reason of this taking of the FEE SIMPLE INTEREST, in accordance with Massachusetts General Laws chapter 79, sections 6, 7A and 12 as amended, as well as an award in the amount of Thirty-three Thousand Five Hundred Seventy-five and 85/100 Dollars ($33,575.85), reflecting prorated taxes as required by said section 12. The Authority

reserves the right to amend the award at any time prior to the payment thereof for good cause shown.

THE MASSACHUSETTS TURNPIKE AUTHORITY

/s/ Allan R. McKinnon
Allan R. McKinnon, Chairman

/s/ Ann M. Hershfang
Ann M. Hershfang,
Vice Chairwoman

/s/ Thomas J. Curley, Jr.
Thomas J. Curley, Jr.,
Board Member

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[LOGO] MASSACHUSETTS TURNPIKE AUTHORITY
State Transportation Building, 10 Park Plaza,
Suite 5170, Boston, MA 02116
(617) 248-2800 fax: (617) 523-0729

[Names Omitted In Printing]

David B. Struhs, Commissioner
Department of Environmental Protection
One Winter Street, Third Floor
Boston, MA 02108

RE: Petition for Approval of Substitute HOV Project
Pursuant to 310 C.M.R. 7.37

Dear Commissioner Struhs:

As you know, the Massachusetts Turnpike Authority has completed an extensive evaluation of various options to promote the utilization of high occupancy vehicles on the Turnpike I-90 mainline serving the Boston area within Route 128 (the "Boston Extension"). The evaluation, which was reported in its High Occupancy Vehicle Lane Feasibility Study, June, 1994 ("Feasibility Study"), is one of several steps which have been undertaken by MassPike in support of the Commonwealth's compliance strategies being developed pursuant to the Clean Air Act.

As a result of the Feasibility Study, which was submitted to the Department of Environmental Protection orig nally in August, 1993 and again, with further supplementation, in June, 1994, MassPike has concluded that the best option to support Clean Air goals as they relate to the HOVs using the Boston Extension, is to implement the Park and Ride Program option. By this letter, and the accompanying materials, MassPike requests that DEP approve the Park and Ride Program

as a "substitute project" in accordance with DEP's HOV regulation at 310 C.M.R. 7.37(8).

Background of MassPike HOV Program

The Boston Extension is a toll facility serving a broad set of users and performing an essential function within the larger, Boston metropolitan area transportation system. In particular, the Turnpike provides a high quality level of service for vehicles used in work or commutation travel as well as for commercial transportation, freight movement and shopping and leisure trips. The predominant although not exclusive area served by the Boston Extension includes east-west travel to and from the Boston metropolitan region inside Route 128, including Logan Airport.

MassPike is committed to managing the Turnpike in a manner which complements the other elements of the metropolitan transportation system. The market for the trips served by the Boston Extension is extensive. This market will continue to grow at a significant rate even under conservative assumptions regarding economic growth and land-use development.

* * *

JAMES C. ROSENFELD
SENIOR VICE PRESIDENT

February 5, 1997

Governor Edward King
Executive Office
Massachusetts Turnpike Authority
10 Park Plaza – Suite 5170
Boston, MA 02116

RE: Interchange 12
Framingham, MA

Dear Governor King:

It was a pleasure to meet with you, David Nagle and Ed Hanley to discuss the development opportunities that may be available on land owned by the Massachusetts Turnpike Authority at Interchange 12 in Framingham.

Boston Properties is interested in pursuing the development of the approximately 24-acre parcel located within the oval of the interchange ramps to the south of the Turnpike roadway and, with this letter, is requesting the exclusive right to study the development feasibility of this property for 90 days. Our objective during this due diligence period will be to investigate in detail the development potential of this site and prepare business terms for a ground lease with the Turnpike Authority. The work would include:

1. *Site Access*: We will investigate further with the engineers the access options which we reviewed with you in our meeting on January 30. Our current thinking is that creating a signalized intersection on Route 9 at the existing entrance to the

Tara Hotel and constructing a bridge to the south across the Turnpike will provide the most direct and lowest cost access to the site. We will study this in further detail to confirm its viability and to develop construction budgets.

2. *Master Plan:* We will prepare a master plan for the property consistent with the M-1, Light Industrial Zoning District of the Framingham Zoning By-law. Currently, the site has no zoning or is residentially zoned, so a rezoning for commercial development will be necessary. We think that the Light Industrial Zoning similar to the 9/90 Crossing Development immediately to the west of the Turnpike will probably be considered the most appropriate by the Town. This zoning will permit approximately 330,000 SF to 420,000 SF of development which we would see occurring in three to four office buildings.

3. *Approval Process:* Boston Properties will develop a time line and schedule for the approval process which would include rezoning of the parcel to commercial use, site plan approval and special permits as required from the Town of Framingham, the MEPA environmental review process and state permits from the Massachusetts Highway Department and Department of Environmental Protection.

4. *Ground Lease:* At the conclusion of the due diligence period, Boston Properties will prepare terms for a long term ground lease taking into account the total potential development on the parcel, and the

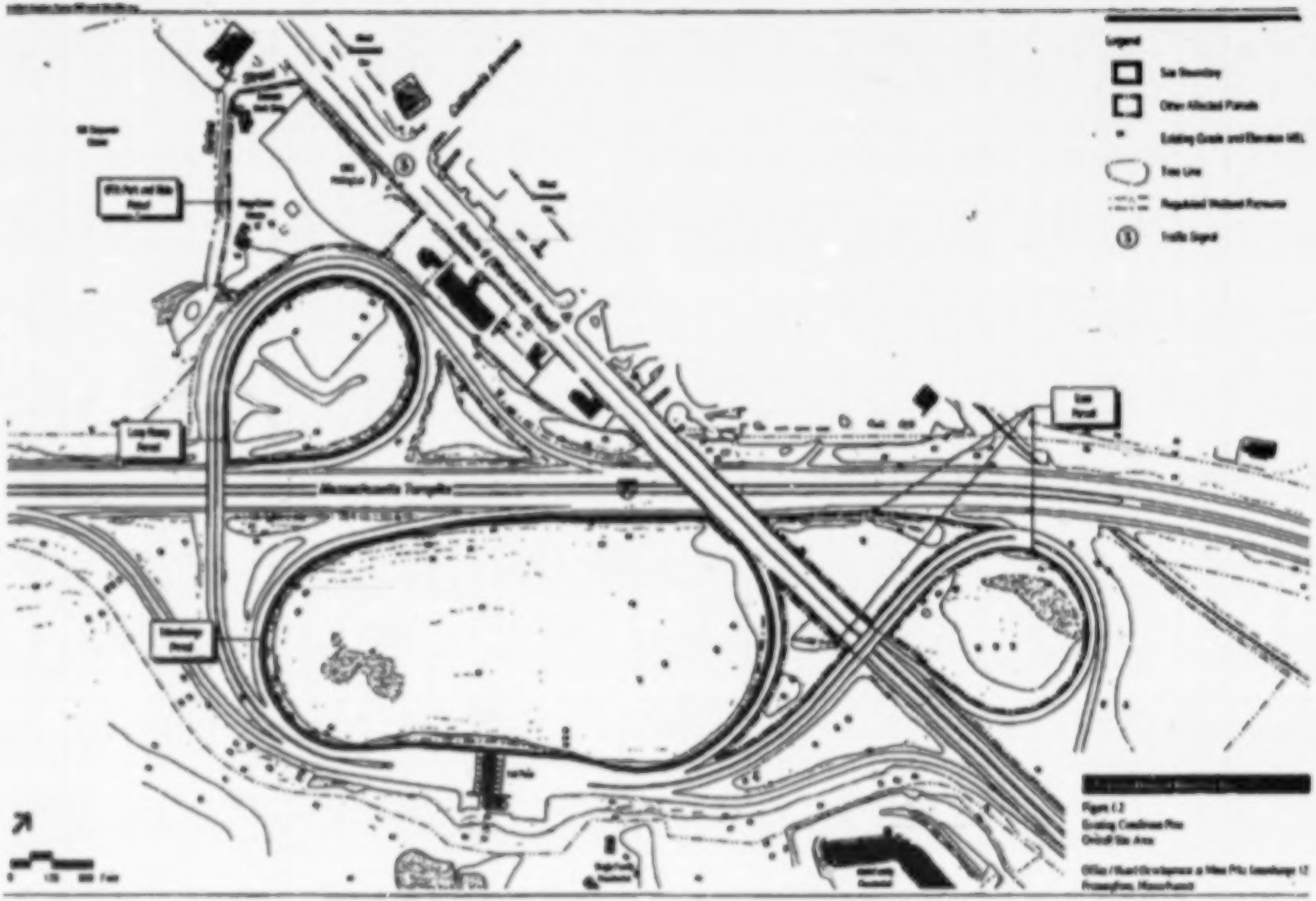
cost of infrastructure to provide access and bring utilities into the site.

Though there are hurdles to be overcome – access and rezoning being the two most significant – we think that Interchange 12 should be a very successful development and provide an economic benefit and strong financial return to the Turnpike Authority.

We are excited about the opportunity of working with the Massachusetts Turnpike Authority and look forward to your favorable response to this request and our designation as the developer of this property.

Sincerely,

/s/ James C. Rosenfeld
James C. Rosenfeld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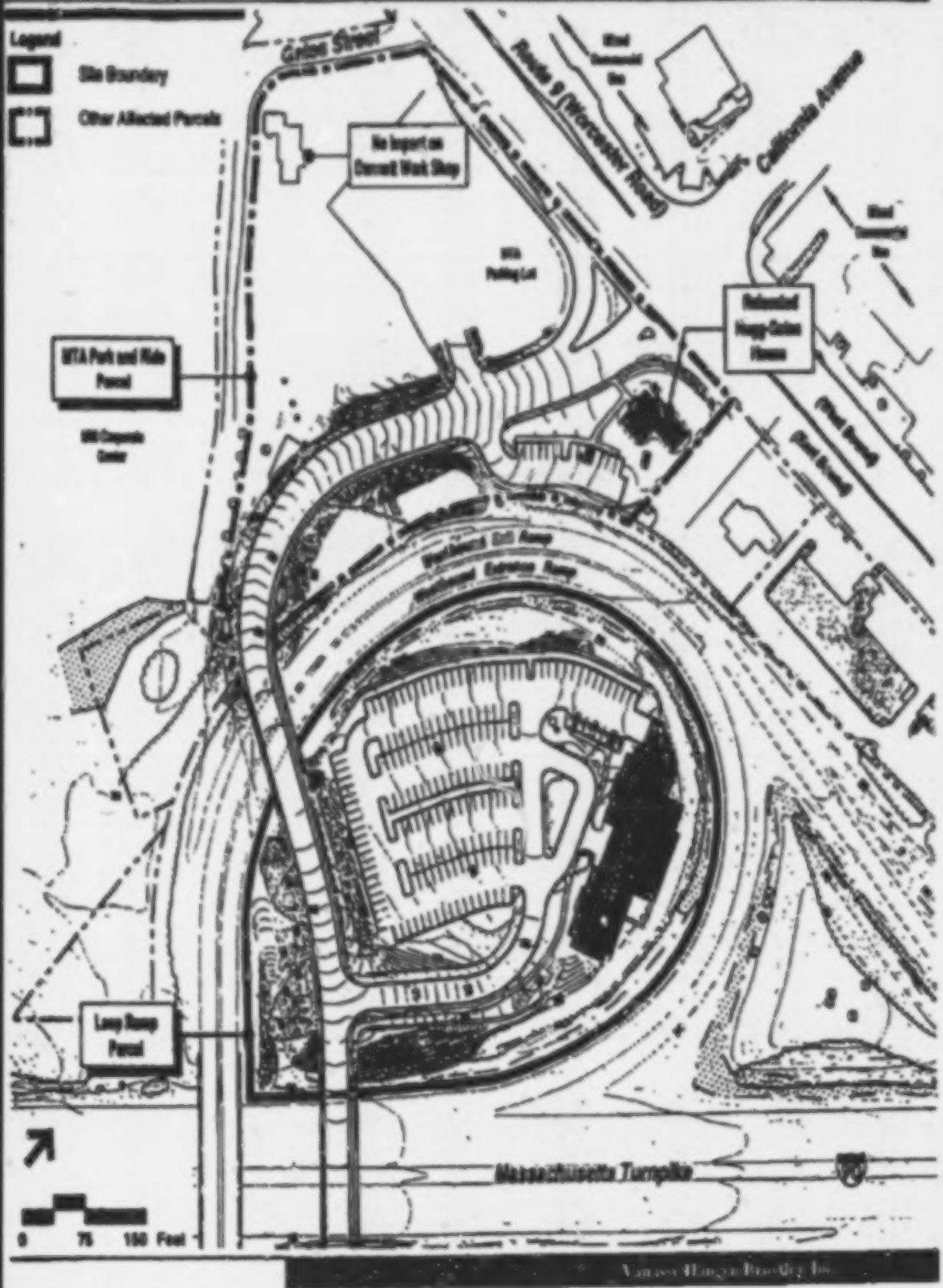
Massachusetts Turnpike



Proposed Conditions
Historic Resources
MTA Park and Ride Parcel Area
Office / Hotel Development
at Mass Pike Interchange 12
Framingham, Massachusetts

Figure 2.2

HIGH OCCUPANCY VEHICLE LANE FEASIBILITY STUDY

Prepared for:

MASSACHUSETTS TURNPIKE AUTHORITY [LOGO]

by:

URS CONSULTANTS, INC.

in association with:

Howard/Stein Hudson Associates, Inc.

&

KM Chng Environmental, Inc.

June 30, 1994

* * *

The potential demand for Park & Ride lots was developed based on data obtained during the postcard survey of Turnpike drivers conducted in the Fall of 1992. This survey is documented in Technical Memorandum "Park & Ride Postcard Survey Preliminary Findings", dated January, 1993. For the survey, postcards were distributed to all motorists entering the Turnpike ticket system during the 6AM-10AM peak period on a typical weekday. Information obtained included trip origin and destination and general attitudes toward ridesharing and ridesharing incentives. This survey received an average 14.2 percent response.

Based on this information, the Authority has estimated that 70 percent of Park & Ride lot users would choose to continue their trip downtown on buses, assuming service is provided, 10 percent in vanpools, and 20 percent in carpools. The survey information led to development of a demand at each interchange for parking spaces for

carpooling/vanpooling and/or express bus service. A previous "Commuter Rail Extension Feasibility Study", prepared for the MBTA, evaluated intermodal facilities at some of these locations. That report was reviewed for use and inclusion in this study.

The results of the Turnpike users survey revealed that 6,065 respondents were interested in participating in a Park & Ride program. The data showed that approximately 95 percent of trip purpose was commuting to work. To be conservative and based on the study team's experience, it was first assumed that 50 percent of the interested respondents would actually participate and use the Park & Ride lots. Based on the grouping of origin/destination pairs, this number was further reduced to 1,500, which represents the number of parking spaces recommended for construction between now and the year 2000 to serve Greater Boston and Cambridge. This represents only approximately 25 percent of the total number of respondents who noted that they would be interested in carpooling. All of these persons are presently using the Turnpike. Therefore, the 1,500 carpool parking spaces are essentially based on existing auto-oriented and Turnpike-oriented demand at the various interchanges.

Based on the survey results, 80 percent of the 1,500 spaces *(1200)* would be used by commuters with destinations along the Route 128 corridor. Of the 1,200 drivers with destinations within the Route 128 beltway, 70 percent were assigned to buses, 20 percent to vanpools and 10 percent to carpools. This means that the total bus ridership is projected to be 840 passengers. The study team assumed a bus occupancy of 28 persons per bus for a total of 30 new buses on the Turnpike.

With regard to the relationship between the demand analysis for Park and Ride and the ridership projection for the Worcester Commuter Rail, Figure 18 depicts the corridor in which the Massachusetts Turnpike and the proposed Worcester Commuter Rail Extension from Framingham to Worcester are located. Shown also are the locations of the proposed Turnpike Authority Park & Ride lots as well as the proposed stations that may serve the Worcester Rail line.

The MBTA and the Central Transportation Planning Staff (CTPS) are currently refining the ridership forecasts for the Worcester Commuter Rail. However, the MBTA estimates that are currently available are based on the trips to work data from the 1990 census and are shown in Table 16 and 17. The work trip destinations for Boston CBD and Cambridge are shown in Figure 19 and those for all of Boston within city limits and Cambridge are shown in Figure 20. The MBTA/CTPS analysis projects Worcester

* * *

5. *Park & Ride Alternative*

The Park & Ride alternative aims to reduce the number of SOVs and VMTs by providing convenient parking lots where persons can leave their cars and utilize ridesharing options. This alternative includes the construction and operation of 1,500 parking spaces along the Turnpike by the year 2000. These 1,500 carpool parking spaces are based on existing demand at the various interchanges.

The basis for the estimate of Park & Ride users was a postcard survey of Turnpike users conducted in the Fall of 1992. The results of the survey revealed that 6,065 respondents were interested in participating in a Park &

Ride program. In this survey, the data showed that approximately 95 percent of trip purposes were commuting to work. To be conservative and based on experience, it was assumed that 50 percent of interested respondents would actually use the Park & Ride lots. Based on the grouping of origin/destination pairs, this number was further reduced to 1,500, representing only approximately 25 percent of the total number of respondents who noted that they would be interested in carpooling.

a. Congestion

Congestion on the Boston Extension will be significantly reduced by the Park & Ride alternative. The analysis has shown that 1,170 vehicles would be removed from the Boston Extension. This translates into increased speeds and decreased travel times to complete the 11.5 mile trips along the Extension.

b. Travel Time Savings

Travel times as the result of the Park & Ride Alternative are shown in Figure 35. With the Park & Ride lots in place, it is expected that there will be a significant savings in travel time for all users. In some cases travel time will be cut in half. As shown in Table 27, all traffic would save 27.5 minutes under the 3+ or 2+ occupancy Park & Ride alternative.

The calculated average speed for the AM eastbound hour traffic, with the removal of 1,170 vehicles resulting from the Park & Ride alternative, is 41.3 MPH for a travel time of 16.8 minutes for the Extension in the year 2000. For the PM westbound peak hour, the average calculated speed is 46.5 MPH for a travel time of 13.9 minutes. The

travel time benefits for the Park & Ride alternative will maintain travel times below the DEP Regulatory Threshold until the year 2005 with 1,500 spaces. However, as more parking lots are added, the period of time savings benefits should increase.

* * *

Technical Memorandum

PARK & RIDE FEASIBILITY STUDY
INTERCHANGES 1 THROUGH 15

Prepared for:

MASSACHUSETTS TURNPIKE AUTHORITY [LOGO]

MT 00239

URS CONSULTANTS, INC.
in association with:
Howard/Stein-Hudson Associates, Inc.

June 1993

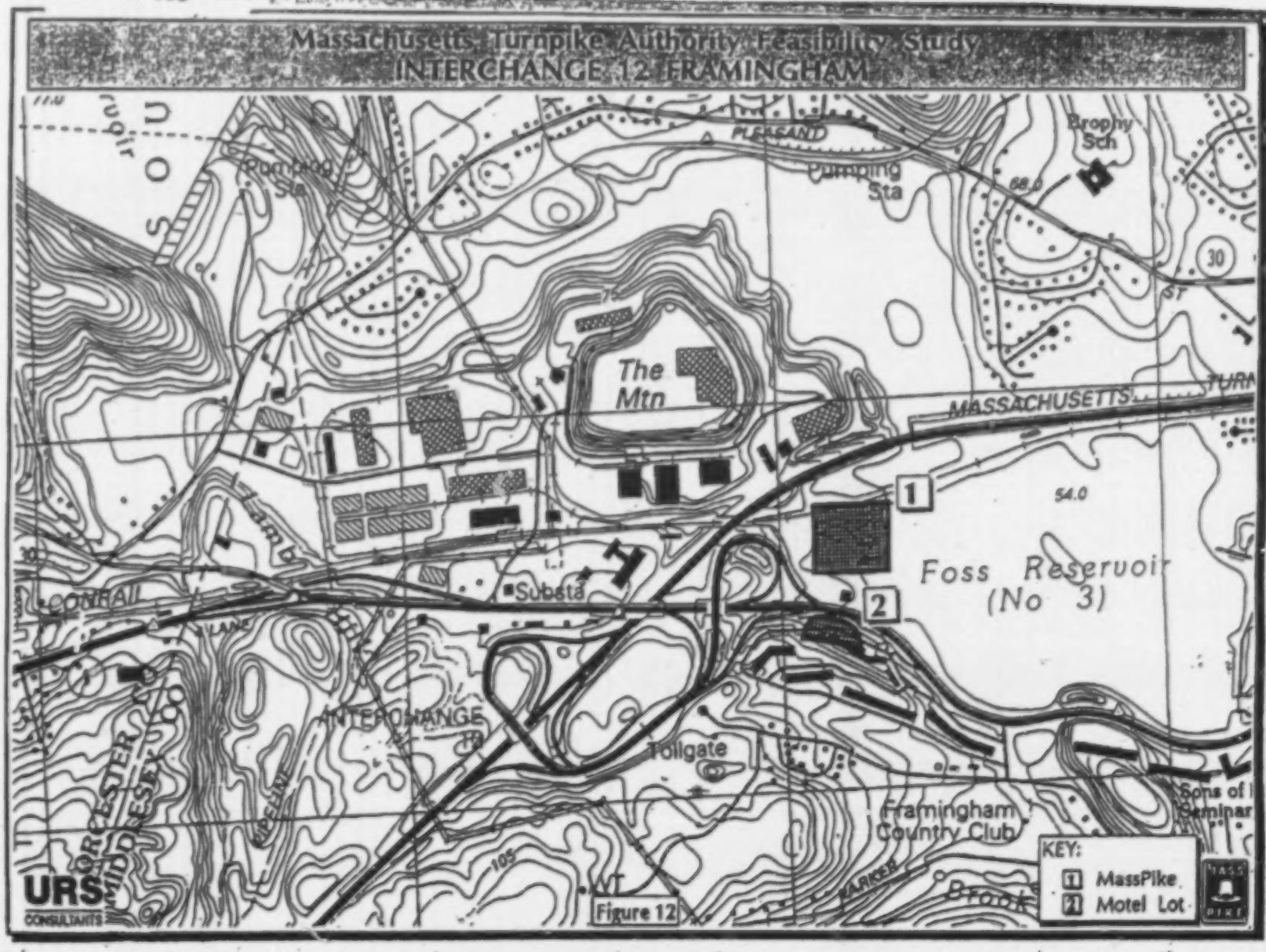
* * *

Interchange 12 (Framingham)

The HOV parking demand is split among 14 destinations which would have a peak demand of 351 spaces. Back Bay, Downtown Boston, Cambridge, and Waltham would have candidates to support bus service, while Newton indicates a demand for vanpool service. The remaining nine destinations: Brookline, Burlington, Lexington, Needham, Norwood, Roslindale, Roxbury, Watertown, and Wellesley, would only provide candidates for carpools. The demand range for HOV parking is from 290 to 450 spaces depending on the actual modal breakdown. The data shows that there are significant numbers of commuters with a destination of Framingham, Marlborough, Cordaville, Ashland, Westborough, and Northborough. Based on this information, 250 additional parking spaces are recommended for this interchange.

At Shoppers' World on Route 9 in Framingham, approximately 2.5 miles from the interchange, there is a Massachusetts Highway Department (MHD) commuter lot and a Massport Logan Express lot. Massport and MHD may lose these parking lots when the leases run out in 1996. Since there are approximately 150 MHD parking spaces and 300 Logan Express spaces at this location, replacement could be considered as part of any MassPike park & ride solution.

Figure 12 displays two possible sites for lots at this location. One is a large piece of land owned by MassPike adjacent to the interchange that could be developed to accommodate a lot of 250 or 400 parking spaces. Another option is to purchase or lease the site of a closed motel opposite the Taco Bell restaurant on Route 9 eastbound, ¼ mile southeast of the interchange. There are traffic lights located within 500 feet of this motel site so that vehicles could make "U-Turns" to access the Turnpike and the parking lot. The motel would not need to be demolished to provide the 250 spaces needed for the park & ride lot, however, this location would be ideal for replacing the parking spaces lost at the MHD lot. If these spaces were relocated here, then the size of the parking lot should be increased to 400 spaces which would require the development of the entire piece of property as a parking lot. Accommodation of Logan Express bus services and parking spaces would require more space and construction.



COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF THE COMMONWEALTH

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION
NO.: 97 4161

TIMOTHY K. HANNA and CMA REALTY TRUST,
Plaintiffs,
v.
MASSACHUSETTS TURNPIKE AUTHORITY,
Defendant

AFFIDAVIT OF PETER PICKNELLY

1. My name is Peter A. Picknelly. I am currently the President of Peter Pan Bus Lines, Inc. (hereinafter "Peter Pan").

2. I have continuously been the President of Peter Pan since before 1994.

3. At some time in the past, Peter Pan did run regularly scheduled bus service to and from the so-called "park and ride" facility located in Natick, Massachusetts at the "Shoppers World" shopping center.

4. To the best of my knowledge and belief, neither I myself, nor any other employee of Peter Pan was ever invited to attend any meetings organized or conducted by the Massachusetts Turnpike Authority (hereinafter the "MTA") concerning facilities location of the MTA's "park

and ride" lot located at 1672 Worcester Road, Framingham, Massachusetts near interchange 12 of the Massachusetts Turnpike roadway (hereinafter the "Framingham park and ride") or any other "park and ride" lot constructed by the MTA between 1990 and 1995.

More particularly, no one from Peter Pan was ever consulted regarding any of the proposed locations of the MTA's park and ride facility at Interchange 12 of the Turnpike roadway in Framingham.

5. Neither I, nor any other employee or representative of Peter Pan, was ever asked to comment upon or provide suggestions relating to bus transit access prior to the construction of the Framingham park and ride lot.

6. Assuming it is in fact so that the Framingham park and ride lot was opened to the public in November of 1994, Peter Pan did provide daily service on Mondays through Friday according to the following schedule:

Departures: 6:15 and 6:40 a. m. and

Returns at: 5:55, 6:25 and 7:40 p. m.

7. At sometime early in 1996 the number of hours during which Peter Pan provided service to the Natick Shoppers World park and ride lot, or site were reduced.

As of April 3, 1996 Peter Pan promulgated a new schedule. The schedule did not identify any service to the Framingham park and ride facility. It has been alleged that Peter Pan did provide expanded service to this facility daily on Mondays through Fridays commencing in April, 1996. Therefore, it must be the case that this location became a so-called "flag stop." Which means that Peter Pan's buses went by the location in the mornings, but only

stopped if a dispatch person signaled that there was one or more persons to be picked up. Likewise, in the evenings, the bus driver would inquire of passengers if any of them wanted to go to the lot, and the bus would only stop there if at least one passenger answered in the affirmative.

Based on the foregoing, I can not make any statement as to the number of times Peter Pan buses went by this location during the time the schedule which became effective as of April 3, 1996 remained in effect.

8. Whatever service Peter Pan provided, commencing as of April 3, 1996 was part of its regular route service between Worcester and Boston which also provided service to other passenger drop-off and pick-up loctions.

9. Between 1994 and 1996, passenger use of Peter Pan's service from and to the Framingham park and ride lot was consistently sparse. On many days Peter Pan would only pick up two or three passengers. And it is probably so that the company never picked up more than ten people on any day.

10. In 1995, after the Massachusetts Highway Department cut through the median and constructed a new intersection at California Avenue and Route #9, the level of passenger use of Peter Pan's service to Framingham park and ride lot remained substantially the same.

11. As of June 26, 1996, Peter Pan adopted a new schedule. Exhibit A attached hereto is a copy of that schedule. It shows the service which Peter Pan provided to the Framingham park and ride lot for as long as that schedule remained in effect. Peter Pan adopted a new schedule sometime in September, 1996.

12. At no time did any representative of the MTA ever contact Peter Pan about its offering to develop and sponsor a program which would provide a subsidy to the service at the Framingham park and ride which be sufficient to induce Peter Pan to continue to operate the service.

Eventually, as Peter pan determined that it was losing money by servicing the Framingham park and ride lot it discontinued the service.

Signed under the pains and penalties of perjury this 28 day of August, 2002.

PETER PAN BUS LINES, INC.

By: /s/ Peter A. Picknelly
Peter A. Picknelly, President

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.	SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

TIMOTHY K. HANNA and CMA REALTY TRUST, Plaintiffs,	
v.	CIVIL ACTION NO.: 97 4161
MASSACHUSETTS TURNPIKE AUTHORITY, Defendant.	

AFFIDAVIT OF GEORGE H. BURNHAM, JR., P.E.

I, George H. Burnham, Jr., do hereby depose and state as follows:

1. My name is George H. Burnham, Jr., P.E. and I am certified by the Commonwealth of Massachusetts as a Registered Professional Engineer in Civil Engineering and work as an independent transportation consultant.

2. I was retained by the plaintiffs in the above-captioned case to review the traffic planning and forecasting used in connection with the eminent domain taking, siting and construction of the "Park and Ride" facility located at 1672 Worcester Road in Framingham, Massachusetts (the "Subject Property") and owned and operated by the Massachusetts Turnpike Authority.

* * *

18. Exhibit B shows the capture area for a "Park and Ride" lot at Exit 12. The capture area outlined in Exhibit B represents where approximately 75 percent of the likely users will reside.

19. The capture area for a "Park and Ride" lot at Exit 12 has a population of approximately 36,400 people according to the 1990 US Census figures.

Specific Relevant Massachusetts Turnpike Authority HOV Lane and Park & Ride Project Documents Reviewed

20. I reviewed the following documents which were given to me by Attorney Laurano and have taken them into consideration in formulating my conclusion and the statements herein:

a. "Park-and-Ride Facilities – Guidelines for Planning Design and Operations," January 1986, by the Federal Highway Administration;

b. "Procedures For Estimating Park and Ride Demand In Large Texas Cities," February 1987, sponsored by The Texas State Department of Highways and Public Transportation in cooperation with the Federal Highway Administration;

c. "Commuter Rail Extension Feasibility Study," January 1990, by Stone and Webster Civil & Transportation Services, Inc. *See* Laurano Aff., ¶ 28;

d. "Technical Memorandum – Results of Interview Survey At Millbury Park & Ride Post Card Lot And Extension Lot," December

1992, by URS Consultants, Inc. *See* Laurano Aff., ¶ 25;

e. Returned URS Park & Ride Post Card Survey cards bearing serial numbers "25000" to "50000." *See* Duffy Aff., ¶ 10;

f. "Technical Memorandum – Park & Ride Post Card Survey Preliminary Findings," January 1993, by URS Consultants, Inc. *See* Laurano Aff., ¶ 26;

g. "Technical Memorandum – Park & Ride Feasibility Study," June 1993, by URS Consultants, Inc. *See* McKinnon Aft. Ex. D;

h. "Park and Ride Lots in Massachusetts," April 1993, by URS Consultants, Inc.;

i. Memo – "Interpretation of Recent Survey," April 25, 1995, by MHS Consulting;

j. Massachusetts Turnpike Authority Transit/HOV Project, "Framingham Area Park And Ride Lot Comparisons," September 1995, by MHS Consulting;

k. "Strategies For Improving Usage Of Massachusetts Turnpike Authority's Park And Ride Lot At Exit 12, Framingham," November 1995, by Howard/Stein-Hudson Associates, Inc.;

l. Hand-written notes on parking spaces required (undated), faxed by URS on March 14, 1996. *See* Laurano Aff. ¶ 30;

m. "HOV Lane Feasibility Lane Feasibility Study, Park and Ride Demand Analysis," April 26, 1993, by URS. *See* Laurano Aff. ¶ 29;

n. Massachusetts Turnpike Authority Memo – "Park and Ride Program for MassPike," July 29, 1993, by Massachusetts Turnpike Authority Planning. *See* Laurano Aff., ¶ ___;

o. "Evaluation of Development Proposals For Massachusetts Turnpike Authority Owned Parcels in Framingham, Massachusetts – Public Meeting Workshop Summary and Recommendations," December 2, 1997, by the Metropolitan Area Planning Council;

p. "High Occupancy Vehicle Lane Feasibility Study – Working Paper #1," December 1992, by URS Consultants, Inc.;

q. "High Occupancy Vehicle Lane Feasibility Study – Working Paper #2," April 1993, by URS Consultants, Inc. *See* Laurano Aff. ¶ 27;

r. "High Occupancy Vehicle Lane Feasibility Study"– August 1993, by URS Consultants; Inc. *See* McKinnon Aff. Ex. B;

s. "High Occupancy Vehicle Lane Feasibility Study" – June 30, 1994, by URS Consultants, Inc. *See* McKinnon Aff., Ex. C;

t. "Traffic Impact Report – Proposed Park and Ride Facility Interstate 90 – Massachusetts Turnpike Interchange 12, Framingham, Mass.," July 1994, by Vanasse Hagen Brustlin, Inc.;

u. Robert A. Weant and Herbert S. Levinson, PARKING, Chapter 7, 1990;

v. Transcript of Deposition of Michael Sharff. *See* Laurano Aff. ¶ 10;

w. Transcript of Deposition of Pamela Wessling (2002). *See* Laurano Aff. ¶ 6;

x. Report of Michael Sharff to Basil Tommy of Turnpike Authority. Bates Nos. MT04093 – MT04097; and

y. Transcript of Deposition of Leonard Barbieri. *See* Laurano Aff. ¶ 13.

21. I also visited the Subject Property to get a first-hand view of the "Park and Ride" facility.

Analysis of URS Conclusions of "Park and Ride" Demand for the Park and Ride Program

22. In Document 20(g), 20(l) and 20(m), URS used an arbitrary and unproven Methodology to establish the parking demand for all of the proposed "Park And Ride" lots by ignoring the established procedures as found in Documents 20(a)and 20(b).

23. Said documents 20(g), 20(l) and 20(m) demonstrated that URS calculated 50% of respondents to the postcard survey would become definite users of a "Park and Ride" lot. There is no support for this determination in historical transportation data.

24. URS ignored the MTA's historical capture rate data found in the MTA's own survey of the existing "Park and Ride" lots at Exit 11 in Millbury which demonstrate 8.2% of the peak period traffic entering the turnpike at Exit 11 used bus service and 1.1% used carpooling (Document 20(d)).

25. URS ignored the Worcester Rail study demand modal split information in Document 20(c), (pages 5-9 and

5-10 and Table 5-4) showing that if the commuter rail service were extended to Worcester, that an expanded bus service would not be a viable transportation option along Route 9 east, thus "Park and Ride" lots to serve bus commuters would be unnecessary. According to the June 1993 "Park and Ride" Feasibility Study, URS reviews this document in its analysis. *See* McKinnon Aff., Ex. D, (Bates No. 00243.)

26. URS ignored the findings included in Document 20(q) which demonstrated that 70% of the projected parking demand would only occur if bus service were established (see page 38).

27. URS failed to isolate answers to question 3(i) of the postcard survey and analyze demand for a "Park and Ride" under that question only, where all that is offered the commuter is a free place to park. This failure was substantial, given that the MTA failed to provide 20 minute bus service or offer significant other incentives to carpoolers.

28. URS failed to clearly underscore the significance of the fact that the postcard survey data was based upon a multiple style question. The significance of the multiple style question is that the respondent does not answer one question at a time, but a question with related and contingent components. In the post card survey, question # 3 is a ten-part multiple style question giving the respondent the chance to check off one or more answers up to all ten. At Interchange 12, as with the other interchanges, the most popular answers were a "discount toll program"(for two-person carpools typically written in as a comment) and a free parking lot. At Exit 12, the discount program response received 49.8% and the free parking lot received 51.5%. If

all the respondents who checked off a free parking lot also checked off a discount toll, the maximum demand for what was constructed, a free parking lot, was 51.5% minus 49.8% or 1.7%. Assuming that all of the 1.7% respondents can be accommodated into carpools (a very unlikely scenario), by factoring the sample to the entire AM peak period at Interchange 12 gives 73 vehicles entering a parking lot in the AM peak period. To estimate the amount of parked cars, the 73 vehicles into the lot is divided by 2 for two-person carpools, which results in 36 parked vehicles. For three person carpools, the 73 entering vehicles is divided by 3 and multiplied by 2, which results in 49 parked vehicles at best.

29. URS failed to document what transportation forecasting principles or past studies they relied upon in determining in documents 20(c) (pp. 60, 66, Figures 21 and 22), 20(g), 20(l) and 20(m) the percentages of commuters who would park then continue on their commute via bus, vanpool or carpool.

30. URS failed to follow established transportation engineering and planning procedures by not determining, before projecting demand, the likely capture areas for each interchange and the total number of turnpike users who reside in the capture area.

31. A diagram depicting the capture area for the Framingham Exit 12 proposed "Park and Ride" lot is attached hereto as Exhibit B. According to 1990 US Census figures and by factoring the town's total population by the percentage of area within the capture area, the population of the capture area in Exhibit B was estimated to be 36,400. Using the methodology and the capture rate data for small "carpool-only" lots from documents 20(a)

and 20(b), I have estimated the number of parked vehicles per the population of the market capture area and population capture rates of .0005 to .003 for parked vehicles per the population of the market capture area to be between 7 to 43 parked vehicles at Exit 12.

32. This capture area indicated by Exhibit B also represents the area where approximately 53% of the AM peak period users who enter the Turnpike at Exit 12 reside, according to the survey data received by URS. This necessarily means that approximately 47% of the motorists entering the Turnpike at Exit 12 during their morning commute reside outside the capture area of any "Park and Ride" facility placed in the vicinity of Exit 12.

33. There is no data in the URS documents which supports the initial demand for a "Park and Ride" lot with more than 50 parking spaces for any lot situated on Route 9 in the vicinity of Interchange 12 per the lot design guidelines found in documents 20(a) or 20(b), given the data presented to the MTA by URS in document 20(f) there is nothing which supports the conclusion that a "Park and Ride" lot larger than 50 spaces situated on Route 9 in the vicinity of Exit 12 would be fully used without a significant 2-person carpool discount (as indicated in the last paragraph of page 17 in document 20(f)) or the establishment of express bus service at 20 minute intervals.

34. I reviewed the postcard survey which had been delivered to the office of Attorney Michael Laurano. Paralegal Marc Duffy inputted data from every postcard being serial numbers "25000" to "50000"; the range of cards reviewed was intended to be excessive so as to safely

include within it the postcards distributed and returned from Interchange 12.

35. Marc Duffy transferred the data on a spreadsheet and then delivered the spreadsheet entries to me. The data included the card serial number, the town of origin, the ZIP code of the town of origin, the city/town of destination, the ZIP code of the city/town of destination, and if question # 3(i) ("free parking") was the only response checked off out of all answers available for postcard question #3.

36. I arranged the survey data into a spreadsheet file and sorted the serial numbers sequentially. I analyzed the data for card sequence breaks and point of origin zip codes and I determined that the postcards returned to URS bearing serial numbers "34650" to "39200" were those handed out at Interchange 12.

37. URS maintained 286 returned postcard survey response cards within the range of serial numbers "34650" to "39200". URS's postcard survey report presented to the Turnpike Authority indicates that there were 284 responses for postcards handed out at Interchange 12. The variation of 2 postcard summations is statistically acceptable.

38. Because the Turnpike Authority did not establish express scheduled bus service to the lot at Interchange 12, did not establish vanpooling from the lot and did not offer significant two-person carpool incentives other than free parking, I calculated the demand for carpooling with free parking as it was demonstrated in the postcard survey results.

I had already determined the portions of towns repre[illegible]ted in the capture area (*see* ¶¶ 17-19). From the postcard survey results I determined how many vehicles from each town that is part of the capture area entered the turnpike at all interchanges and how many from each town came from the capture area. I then determined the likely number of vehicles which would enter the "Park and Ride" lot at Interchange 12 from the capture area to be 27 vehicles.

40. In the next step, I factored the number of vehicles entering from the capture area to the total vehicles entering the lot and calculated thirty-six (36) vehicles entering the lot.

41. I next calculated the number of vehicles that will be parked in the "Park and Ride" lot. Previous transportation studies showed that carpools typically have 2 to 3 total passengers. Using 2-person carpools, the data available to URS in 1993 indicate that 18 cars will be parked in the "Park and Ride" lot at Interchange 12. Using three-person carpools, the data available to URS in 1993 indicates that 24 cars will be parked in the "Park and Ride" lot at Interchange 12.

42. Unless the MTA intended to cause mass transit type scheduled bus service or a major two-person carpool toll discount incentive program, the data available does not justify a 250-space "Park and Ride" lot in the Exit 12 area. Additionally, given the common knowledge in Massachusetts transportation circles that by January 1994 the Worcester Rail Extension had become a transportation reality, a "Park and Ride" dependant upon same origin and destination express bus service would quickly become unnecessary.

43. Given the data presented to the Massachusetts Turnpike Authority by URS in documents at ¶ 20 (c), (d), (f), (g), (m), (n), (p), (q), (r), and (s), there is nothing which supports the conclusion that a "Park and Ride" lot larger than 50 spaces situated on Route 9 in the vicinity of Exit 12 would be fully used without a significant two person carpool discount program by the Massachusetts Turnpike Authority as indicated by URS to the Massachusetts Turnpike Authority in the last paragraph on page 17 of document 20 (f) or the establishment or express bus service with 20 minute head ways.

44. Massachusetts Turnpike Authority officials had sufficient information in documents at ¶ 20 (c), (d), (f), (g), (m), (n), (p), (q), (r), and (s) to understand that a 250-space "Park and Ride" facility situated on the Subject Property, or any other location suggested on Route 9 in the Interchange 12 area, would be significantly underutilized under the conditions as they existed in 1994, which included the opening of the Worcester Rail Extension later that year.

45. Based on my review of the roadway configuration of the area in the vicinity of Exit 12 of the turnpike, the "Park and Ride" facility on the Subject Property suffered major access problems at the time of opening.

46. The Subject Property is situated on the eastbound side of Worcester Road (Route 9). Route 9 is a divided highway.

47. At the time of the opening of the "Park and Ride" lot to the public, users of the lot could only enter it from the eastbound side of the road.

48. The location posed major difficulties for buses and other vehicles approaching the "Park and Ride" lot

from the east, which the vast majority of users would do on their return trip from Boston in the evening peak periods. These vehicles were forced to travel approximately .4 miles on Worcester Road (Route 9) westbound to the first available turnaround road at Crossing Boulevard and then .3 miles eastbound to the site and then .5 miles eastbound to Country Club Lane and then finally .3 miles to back where they first accessed Route 9 westbound for a total of 1.5 extra miles through 3 signalized intersections. *See* Exhibit C (commuter drive path).

49. These access difficulties posed serious drawbacks to the use of the "Park and Ride" lot and significantly diminished the likelihood that any "Park and Ride" lot along the Route 9 corridor in the vicinity of Exit 12 would attract its full potential usage. These drawbacks should have been factored into the Exit 12 "Park and Ride" demand calculation and adjusted the overall usage estimate down by 10 to 20 percent.

50. It is my understanding that no costs-benefits comparative analysis was done between alternative sites or was factored into the MTA's decision to build a "Park and Ride" lot on the Subject Property. Comparative costs to benefits analysis is considered prudent and good transportation planning and is generally done when there is more than one possible location in which public funds are to be expended.

51. An example of a costs-benefits analysis follows as such:

A public agency is faced with a choice of constructing a transportation facility on one of two separate pieces of property, "Site A" and "Site B." Suppose that Site A is private property and Site B is property owned by the

public agency. If the given benefits of any facility equals $200,000 in present worth dollars and the cost of construction of both sites is $25,000.00, but the cost of acquisition of Site A is $100,000, whereas Site B has no cost of acquisition, then the costs-benefits comparison would be as follows:

$$\text{Site A} = \frac{\$200,000}{\$100,000 + \$25,000} = 1.6$$

$$\text{Site B} = \frac{\$200,000}{\$25,000} = 8.0$$

Therefore, Site B would be a significantly greater value over Site A.

52. Based on my assessment of the demand for "Park and Ride" services at Exit 12, any expansion of the Subject Property lot's current size of approximately 110 vehicle capacity would be unrealistic and completely unwarranted based on the relevant data.

53. In connection with the construction of the "Park and Ride" lot on the Subject Property, the Massachusetts Turnpike Authority demonstrated a clear deviation from fundamental principles of transportation engineering and planning by:

a. Accepting and acting on a transportation report not stamped and signed by a Civil or Traffic Engineer registered to practice Civil Engineering or Traffic Engineering in the Commonwealth of Massachusetts as required by Chapter 112: Section 81M of the General Laws (Certification of registration; prima face [sic] evidence; seal of registrant);

b. Not having a competent registered civil/ transportation engineer or planner on its Planning and Development staff or on retainer to review the uncertified reports of its outside consultant to verify their accuracy and conclusions;

c. Failing to conduct a benefits to cost analysis between the alternate possible sites before selecting the Subject Property for the "Park & Ride" lot;

d. Ignoring information within the URS reports related to the conditions necessary for a successful "Park & Ride" lot to succeed at Exit 12;

e. Under the circumstances known to the Turnpike Authority, not establishing a small experimental "Park and Ride" lot to test commuter demand in the vicinity of Exit 12.

f. Ignoring and/or not taking into consideration the commuter inconvenience associated with the return access problems connected with the divided highway and turnpike entrance and exit configuration.

g. Jointly with URS by publishing the HOV Lane Feasibility Study of June 1994 (*see* ¶ 20(s)) which contained erroneous assumptions, unsupported by the data available and generally accepted transportation forecasting principles on pages 60 and 66 and Figures 21 and 22 and later attaching it as an exhibit to support the Turnpike Authority's substitution petition letter of May 12, 1995 submitted to the Massachusetts Department of Environmental Protection.

54. It is my opinion that based on my review of the work done by and for the Turnpike Authority in connection with the "Park and Ride" lot project on the Subject Property, the Turnpike Authority failed to exercise the care expected of a reasonable public transportation agency in the data collection, data analysis, siting and selection of the "Park and Ride" lot on the Subject Property.
